No. 85-1066

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCT. TERM, 1985

JAMES G. MARTIN, *et al.*,

*Appellants,*

v.

TERRY L. HAITH,

*Appellee.*

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

## JURISDICTIONAL STATEMENT

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## QUESTIONS PRESENTED

I. **Whether this Court's decision in *Allen v. State Board Elections*, 393 U.S. 544 (1969), should be extended to cover a state's judiciary?**

II. **Whether past changes in North Carolina's judiciary must now be precleared pursuant to §5 of the Voting Rights Act, in light of the special circumstances of this case?**

## PARTIES TO THE PROCEEDINGS

The appellants, defendants in the proceedings below, are James G. Martin, in his capacity as the Governor of the State of North Carolina; Lacy H. Thornburg, in his capacity as Attorney General of the State of North Carolina; Thad Eure, in his capacity as Secretary of State of the State of North Carolina; The State Board of Elections of North Carolina; Robert N. Hunter, in his official capacity as Chairman of the State Board of Elections, Ruth Semashko, Robert F. Browning, William A. Marsh, Jr. and Margaret King, in their official capacities as members of the State Board of Elections.

The Appellee, Plaintiff in the proceedings below, is Terry L. Haith, a black resident and registered voter of the State of North Carolina.

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## ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

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## JURISDICTIONAL STATEMENT

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### OPINION BELOW

The September 27, 1985, Order and Memorandum Opinion, entered in *Haith v. Martin,* No. 84-1319-CIV-5, by the three-judge panel are set forth in the accompanying Appendix A and Appendix B.

### JURISDICTION

On November 27, 1984, Plaintiff below, a black resident and registered voter of North Carolina, filed a complaint for a declaratory judgment that certain enactments by North Carolina's General Assembly which affected the State's judiciary were being enforced in violation of §5 of the Voting Rights Act of 1965, as amended, 42 USC 1973c, and for an order enjoining the State from conducting elections pursuant to said enactments until submitted and precleared pursuant to §5. On February 27, 1985, Plaintiff amended its complaint to include numerous additional enactments which had not received preclearance. A statutory three-judge court was convened as required by 28 USC §2284 and 42 U.S.C. § 1973c.

Plaintiff filed motion for summary judgment on the §5 issues presented by the case and the State filed cross-motion for summary judgment. The State herein appeals from the District Court's granting of summary judgment on September 27, 1985, against the State. Notice of Appeal was filed in that Court on October 7, 1985. Jurisdiction is conferred on this Court by 28 USC §1253 and 42 USC §1973c, to hear any appeal from an action under 42 USC §1973c. *NAACP v. New York,* 413 U.S. 345, 353-56 (1973).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional provisions and enactments, as set forth below, are set forth in Appendix G.

U.S. Const. Amend XIV

U.S. Const. Amend XV

42 U.S.C. §1973

42 U.S.C. §1973c

Chapter 262, North Carolina Session Laws of 1965

Chapter 997, North Carolina Session Laws of 1967

Chapter 1119, North Carolina Session Laws of 1977

Chapter 1130, North Carolina Session Laws of 1977

Chapter 1238, North Carolina Session Laws of 1977

Chapter 1109, North Carolina Session Laws of 1983

## STATEMENT OF THE CASE

This appeal arises from an action brought by Plaintiff below to obtain declaratory relief and to enjoin the further enforcement of certain North Carolina statutes relating to the election of superior court judges unless and until those statutes are submitted to the United States Attorney General and approved in accordance with the provisions of §5 of the Voting Rights Act of 1965, as amended, 42 U.S.C §1973c.

It was alleged that the following enactments of the General Assembly of North Carolina are currently in force, in violation of §5:

Chapter 262, Session Laws of 1965

Chapter 997, Session Laws of 1967

Chapters 1119, 1130, and 1238, Session Laws of 1977

Chapter 1109, Session Laws of 1983

Each of these acts was passed subsequent to November 1, 1964. The Voting Rights Act of 1965 requires that all changes in any "standard, practice, or procedure with respect to voting" occurring in a jurisdiction covered by the Act after November 1, 1964, be approved by the United States Attorney General or by the United States District Court for the District of Columbia.

Following November 1, the North Carolina General Assembly enacted Chapter 262, Session Laws of 1965. The act amended N.C.G.S. §163-147 (now §163-106(d)) by requiring judicial candidates in multi-seat districts to designate the seat for which they run.

In 1967, the General Assembly passed Chapter 997, Session Laws of 1967, which provided additional resident superior court judges for certain judicial districts. These added judgeships were filled for full 8-year terms, which thus created staggered terms for the judges in each of the above districts. In 1977, the General Assembly again added judgeships seats, again with staggered terms, to other districts. (Chapter 1119, Session Laws of 1977.)

Also in 1977, Chapters 1130 and 1238 split some judicial districts. In 1983, the General Assembly added new superior court judges, for staggered terms, in still more districts. (Chapter 1109, Session Laws of 1983.)

The State admitted that Chapters 1119, 1130, and 1238 of the Session Laws of 1977 and Chapter 1109 of the Session Laws of 1983 had not been precleared. The State contended that Chapter 997 of Session Laws of 1967 and Chapter 262 of Session Laws of 1965 had been precleared because of inclusion of their provisions in later enactments of the General Assembly which were submitted to the Attorney General and approved.

The State further contended that its actions with respect to each of the foregoing enactments had been taken in response to representations made by the United States Attorney General to

> This so-called "preclearance" requirement is one of the most extraordinary remedial provisions in an Act noted for its broad remedies. Even the Department of Justice has described it as a "substantial departure...from ordinary concepts of our federal system"; its encroachment on state sovereignty is significant and undeniable. The section must, therefore, be read and interpreted with care.

*Sheffield, supra,* 435 U.S. at 141 (Stevens, J., dissenting) (footnote omitted).

The examination of any statute must begin with its words. Section 5 requires preclearance of "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." The District Court did not conclude that North Carolina's reorganization of its judicial system constituted a "voting qualification or prerequisite to voting"; rather the Court found these statutes to constitute a "standard, practice, or procedure." App. at A-5. Clearly, *Allen* gave a broad construction to that phrase. However, on its next occasion to consider the statute, this Court found it necessary to adopt a limiting construction. The Court concluded that "§5 was designed to cover changes having a potential for racial discrimination in voting." *Perkins, supra,* 400 U.S. at 388-89. Cf. *id.,* at 398 (Harlan, J., concurring in part and dissenting in part). This Court continues to adhere to that standard in judging the scope of the statute. "Thus, in determining if an enactment triggers §5 scrutiny, the question is not whether the provision is in fact innocuous and likely to be approved, but whether it has a *potential* for discrimination." *Doughtery County, Georgia, Board of Education v. White,* 439 U.S. 32, 42 (1978) (emphasis in original).

To determine whether a change has the potential for discrimination, the language of the statute itself again must be examined. To obtain approval under §5, a jurisdiction must demonstrate that a "standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." It is immediately apparent that no North Carolina citizen could possibly have his right to vote denied by the modifications of the judicial system enjoined by the District Court in this case. The

question to be determined, then, is whether North Carolina's statutes have the potential for "abridging the right to vote on account of race or color."

The meaning of this phrase was carefully explained by a leading voting rights practitioner to a House Judiciary Subcommittee in 1975:

> I think section 5 deals with situations where the right to vote is abridged, which includes a dilution, and abridgement is specifically by the [15th] amendment. And I think what we are talking about under section 5 is specifically situations where the operation of a voting change is bringing about a dilution, or abridgement of the vote, based on race ... .

Hearings on H.R. 939 et al. before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 94th Cong., 1st Sess. 636 1975 [hereinafter cited as 1975 House Hearings] (testimony of Armand Derfner). This description of the reach of § 5 is fully consistent with this Court's precedents. The concept of dilution stems from this Court's decision in *Reynolds v. Sims*, 377 U.S. 533 (1964). This decision was well known to Congress in 1965, and this Court held in *Allen, supra*, 393 U.S. at 569, that Congress intended to incorporate the broad concepts of voting set forth in that decision. Accord, *Georgia, supra*, 411 U.S. at 532-33; *Perkins, supra*, 400 U.S. at 390. Indeed, it is to *Reynolds* that the authors of the Senate Judiciary Committee Report looked in setting forth the scope of the most recent amendments to the Act. S. Rep. No. 417, 97th Cong., 2d Sess. 19-27 (1982) [hereinafter cited as 1982 Senate Committee Report). See also Blacksher & Menefee, "At-Large Elections and One Person, One Vote: The Search for the Meaning of Racial Vote Dilution," in C. Davidson, *Minority Vote Dilution*, 203, 207-21 (1984); parker, *The "Results" Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 Va. L. Rev. 715, 718-719 (1983).

In all the judicial opinions and all the legislative history generated during the twenty-year history of the Act, there is not a single suggestion that the concept of abridgement is more inclusive than the concept of dilution set forth in *Reynolds* and its progeny. It was clear by the time Mr. Derfner testified to the House Subcommittee in 1975, if not before, that the rule of *Reynolds* did not encompass a State's decisions with regard to the structure of its judiciary. "The Louisiana constitutional provisions, which this Court today upholds against appellants' renewed constitutional attack, provide for the election of the State's Supreme Court Justices from election districts that are established without regard to population." *Wells v. Edwards,* 409 U.S. 1095 (1973) (White, J., dissenting), aff'd, 347 F. Supp. 453 (M.D. La. 1972). The District Court's decision, which this Court affirmed, held "that the concept of one-man one-vote apportionment does not apply to the judicial branch of the government." 347 F. Supp. at 454. Just weeks before, this Court had summarily affirmed a holding of another District Court "that the one-man, one-vote does not apply to the State Judiciary." *Holshouser v. Scott,* 335 F. Supp. 928, 932 (M.D.N.C. 1971), aff'd, 409 U.S. 807 (1972). See also *Buchanan v. Rhodes,* 249 F. Supp. 860 (N.D. Ohio), *app. dismissed,* 385 U.S. 3 (1966). Indeed, Congress may well have been aware of the limitations upon the *Reynolds* rule as early as its initial consideration of the Act in 1965. Although this Court had not yet spoken on the subject, the only federal Court to do so had held that "the one-man one-vote doctrine, applicable as it now is to selection of legislative and executive officials, does not extend to the judiciary." *Stokes v. Fortson,* 234 F. Supp. 575, 577 (N.D. Ga. 1964).

The rationale of these decisions is immediately apparent. *Reynolds* addressed itself to the problem of assuring equal representation for all citizens in multi-member legislative bodies. One way to do that, as the Court had recognized in the context of State Congressional delegations, is through at-large elections. *Wesberry v. Sanders,* 376 U.S. 1, 8 & n.11 (1964). As a practical matter, however, jurisdictions as large as States must elect their governing bodies from districts. As this Court noted in *Reynolds:*

> Legislators represent people, not trees or acres.... And it is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five, or 10, while the votes

> of persons in another area would be counted only at face value, could be constitutionally sustainable. Of course, the effect of state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical. Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there.

377 U.S. at 562-63 (footnote omitted). The Court concluded, "But the basic principle of representative government remains, and must remain, unchanged — the weight of a citizen's vote cannot be made to depend on where he lives." *Id.*, at 567.

In the context of §5, this Court has found it important to consider whether a governing body "fairly reflects" minority voting strength. *City of Richmond. v. United States*, 422 U.S. 358, 371 (1975). *Cf.*, Proposed 23 C.F.R. §51.59(c)(3), 50 Fed. Reg. 19132 (May 6, 1985). Congress acknowledged the representative nature of this branch of the *Reynolds* doctrine when it amended §2 of the Act in 1982 to guarantee that all classes of citizens should have equal opportunity "to participate in the political process and to elect representatives of their choice." 42 U.S.C. §1973(b). *Cf., White v. Regester*, 412 U.S. 755, 766 (1973). *See generally* 1982 Senate Committee Report, *supra*, at 27-31.

Judges, on the other hand, "are not representatives in the same sense as are legislators or the executive. Their function is to administer the law, not to espouse the cause of a particular constituency." *Stokes, supra*, 234 F. Supp. at 577. Population is not the only important consideration in constructing a judicial system. As the District Court held in *Buchanan, supra:*

> Judges do not represent people, they serve people. They must, therefore, be conveniently located to those people whom they serve. Location, then, is one of many significant factors which the legislature may properly consider when carrying out its constitutional mandate to create an effective judicial system.

249 F. Supp. at 865. The distinction between judges and representatives was further explained in *Holshouser, supra:*

> These judges are hybrid officials with both local and statewide functions and authority. The requirement that

> he reside from the district in which he is elected is a matter of convenience, making him available to hear emergency matters, and convenience is an essential factor in arranging an effective judicial system. He rotates among the districts of his division, and he may be assigned beyond his division by the Chief Justice.

335 F. Supp. at 933.

Unlike representative bodies, trial judges do not make collective decisions. A segment of the electorate can be neither overrepresented nor underrepresented in the mind of a trial judge. His duty is to apply the law as best as he can, and the race, sex, or geographical location of his colleagues enters into the balance not at all. The only possible complaint that a voter could have is that an insufficient number of judges of a particular race have been elected under a particular election system.

It is precisely this complaint which has been repeatedly rejected by Congress and this Court. "But this right to equal participation in the political process does not protect any 'political group,' however defined, from electoral defeat." *City of Mobile v. Bolden,* 446 U.S. 55, 77 (1980) (Opinion of Stewart, J.). Accord, *Whitcomb v. Chavis,* 403 U.S. 124, 156-57 (1971). This viewpoint was fully adopted by Senator Dole in explaining his proposed compromise, which has now become §2 of the Act: "It was generally agreed that the concept of certain identifiable groups having a right to be elected in proportion to their voting potential was repugnant to the democratic principles upon which our society is based." 1982 Senate Committee Report, *supra,* at 193 (aditional views of Sen. Dole). Accord, *id.,* at 68; *is.,* at 197 (supplemental views of Sen. Grassley); H.R. Rep. No. 97-227, 97th Cong., 1st Sess. 30 (1981). Just as "a defendant has no right to demand that members of his race be included on the grand jury." *Alexander v. Louisiana,* 405 U.S. 625, 628 (1972), a voter has no right to demand that members of his race be included on the bench. The law requires, not a white judge or a black judge, but a fair judge.

In short, the concept of dilution simply has no place on the trial bench. Lower courts had so held when Congress considered the Voting Rights Act in 1965 and 1970, and this Court had so held by the time of its reconsideration in 1975 and 1982. It is simply

inconceivable that Congress intended to instruct the Justice Department or the District Court for the District of Columbia to search for signs of dilution in a judicial system where this Court had held that no dilution could exist. Certainly, this Court cannot so hold "without more specific legislative directions." *City of Richmond, supra,* 422 U.S. at 371.

Thus, it is entirely beside the point that Congress made no explicit exception from §5 for the judiciary. There would have been no need to exclude the judiciary from a theory of law in which it had never been included in the first place. Indeed, it is not unprecedented for this Court to conclude that Congress intended not to include the judiciary within the reach of even the most beneficent remedial statute. In *Pierson v. Ray,* 386 U.S. 547 (1967), this Court held that judges were entitled to absolute immunity from actions brought under 42 U.S.C. §1983. As the Court reasoned, "The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine." *Id.,* at 554-55 (footnote omitted). By the same token, the exclusion of the judiciary from the dilution doctrine of *Reynolds* has been well established by this Court's own precedents, and it is proper to assume that Congress would have specifically so provided had it intended to bring the courts within the scope of that doctrine.

This Court has often referred to the "contemporaneous administrative construction of the Act", *Sheffield, supra,* 435 U.S. at 131, by the Justice Department in determining the reach of its provisions. *See also Perkins, supra,* 400 U.S. at 390-94. The Department's contemporaneous construction clearly appears in the record of this case. In 1971 the North Carolina State Board of Elections had actually submitted to the Justice Department certain statutes involving changes in the judicial system. Acting Assistant Attorney General David L. Norman replied, "I must advise you that there were several statutes submitted, such as the changes in the North Carolina court system, which did not deal with voting practices or procedures and, thus, are not subject to Section 5 of the Voting Rights Act." App. at A-49. A further explanation of the Department's view of Section 5 was provided by the Affidavit of former Assistant Attorney General Jerris Leonard, App. at A-13:

> Included among the doubts and concerns was whether or not § 5 of the Voting Rights Act of 1965 applied to judicial and prosecutorial districts and elections, as these offices were not representational in the context of members of the state legislatures, common councils, county boards and commissions.

In reviewing Mr. Norman's letter, Mr. Leonard concluded, App. at A-13:

> [S]uch position taken by Norman could easily be read, in light of its context, to exclude the necessity of submitting legislation relating to the voting districts, terms of office, etc., of judges and/or prosecutors (solicitors). Such a determination was, in fact, not inconsistent with positions taken by the Department of Justice at or about that period of time.

There is nothing in the record of this case to suggest that the Justice Department has changed its view since 1971. Indeed, the State is aware of no published record anywhere to suggest that the Department has changed its view. The rules implementing §5 are found at 28 C.F.R. Part 51, and neither the current rules, nor the proposed amendments, 50 Red. Reg. 19122-34 (May 6, 1985), give any explicit indication that the judiciary is covered by the Act When Congress reconsidered the Act in 1981 and 1982, the Justice Department provided a list of every objection ever entered under §5. Voting Rights Act: Hearings before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong. 2d Sess. 1746-82 (1982) [hereinafter cited as 1982 Senate Hearings]. Only once, in 1980, does it appear that the Department objected to a change involving the judiciary, and that objection was promptly withdrawn. *Id.*, at 1769. The Department also provided, for the benefit of the House Judiciary Committee, summaries of all of its voting rights litigation throughout the history of the Act, none of which involved the judiciary in any way. Extension of the Voting Rights Act: Hearings before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 2442-2575 (1981).

In adhering to its decision in *Allen*, this Court has repeatedly relied upon the failure of Congress to overrule that decision during its periodic reconsiderations of the Act. *Sheffield, supra,*

435 U.S. at 132-35.[2] In this case, however, there is not a word in the voluminous legislative history to indicate that Congress ever had any inkling that *Allen* might be construed to extend the scope of §5 to cover the judiciary. The Justice Department reports to the Judiciary Committees of both houses in 1981 and 1982, discussed above, gave no indication that the judiciary might be covered. Its earliest report to Congress on the subject likewise gave no such indication. Hearings on S. 818 et al. before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 91st Cong., 1st & 2d Sess. 665-666 (1970). The extensive oversight hearings of 1971 make no mention of such coverage. Enforcement of the Voting Rights Act: Hearings before Subcomm. No. 4 of the Comm. on the Judiciary, 92nd Cong., 1st Sess. (1971). Congress has repeatedly reviewed voluminous studies prepared by other organizations, none of which suggest §5 covers the judiciary. *The Voting Rights Act: Ten Years After* (U.S. Commission on Civil Rights), reprinted in 1975 House Hearings, *supra,* at 1008-14; D. Hunter, *Federal Review of Voting Changes* (Joint Center for Political Studies, Voter Education Project, lawyers' Committee for Civil Rights Under

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[2]This Court should be aware, however, that the full Congress has not had an opportunity to reconsider the reach of § 5 since the 1970 amendments to the Act. Because the so-called extension of § 5 is accomplished by the amendment of the limitations period in Section 4(a), § 5 itself was not brought to the floor of the House of Representatives in 1975 or 1982, and any attempt to amend § 5 would therefore have been out of order as non-germane. The only time the House has had an opportunity to pass on its view of the *Allen* decision, it adopted a proposal offered by Representative Gerald Ford and endorsed by President Richard Nixon to remove entirely the preclearance requirement. 115 Cong. Rec. 38514-15, 38535-36 (1969). It was the insistence of the Senate alone which insured the survival of *Allen.*

Congressional failure to act did not cause this Court to adhere to its earlier construction of another civil rights statute when convinced of its mistake. *Monell v. Department of Social Services,* 436 U.S. 458 (1978), overruling *Monroe v. Pope,* 365 U.S. 167 (1961). As in *Monell,* the Senate's intransigence in 1970 hardly amounts to a ratification of *Allen.* This Court has made plain that the law can be changed only by action of both houses of Congress and the President. *Immigration and Naturalization Service v. Chadha,* 462 U.S. 919 (1983). If this Court remains unconvinced of the propriety of its decision in *Allen,* Congressional acquiescence in that decision can no more change the law than Congressional rejection of executive action.

Law), reprinted in 1975 House Hearings, *supra,* at 1562-69; L. McDonald, *Voting Rights in the South — Ten Years of Litigation Challenging Continuing Discrimination against Minorities* (American Civil Liberties Union), reprinted in 1982 Senate Hearings, *supra,* App. at 695-707. It is impossible to conclude from an exhaustive review of the record that anyone had ever advised Congress that *Allen* might in any way restrict the ability of a State to modify its judicial system.

This does not mean, however, that a State's judicial system is immune from challenge where it is designed to discriminate on the basis of race. This is why the result, though not the reasoning, of *Voter Information Project, Inc., v. City of Baton Rouge,* 612 F.2d 208 (5th Cir. 1980), is entirely correct. In that case, the complaint alleged, "The sole purpose of the present at-large system of election of City Judge is to insure that the white majority will continue to elect all white persons for the purposes of City Judge." *Id.,* at 211. If true, such a purpose violates the Constitution, not because the right to vote has been abridged within the meaning of the Fifteenth Amendment, but because the Fourteenth Amendment forbids all purposefully invidious racial determinations by State. *See, e.g., Washington v. Seattle School Dist. No. 1,* 458 U.S. 457, 484-85 (1982). A State can no more rely upon racial considerations in deciding where to put a judicial district than it can in deciding where to put a housing project. *See Arlington Heights v. Metropolitan Housing Dev. Corp.,* 429 U.S. 252 (1977). The courts of the United States are open and capable of determining whether North Carolina discriminated on the basis of race in its modification of its court system. The Appellants in this case argue only that Congress did not intend to delegate the power to make that decision to the Department of Justice or to the United States District Court for the District of Columbia under §5 of the Voting Rights Act.

A contrary decision by this Court would have staggering implications. Courts have not only territorial jurisdiction, but also subject matter jurisdiction. When a State raises the jurisdictional amount for a given court, thereby withdrawing certain cases from a higher court of general jurisdiction covering a broader geographical area, the voters in that larger area would be deprived of their right to elect the particular judges who were to hear the transferred cases. An individual who is a racial minority

in the county but in a racial majority in the circuit might well prefer to have the higher court continue to hear those cases. An argument could be made, and no doubt will be made, if this Court affirms the District Court's decision, that all such jurisdictional reforms must be submitted to the Justice Department for approval. Indeed, the State would be required to seek approval before requiring its judges to undergo continuing legal education, because that could be considered a new qualification for office. That would pose an egregious problem in those States which still use lay magistrates or justices of the peace. To require a State with an elective judicial system to preclear modifications affecting that system "in even a minor way," *Allen*, 393 U.S. at 566, would constitute a substantial expense and a major inhibition to badly needed judicial reforms.

Congress can have had no such purpose when it adopted the Voting Rights Act of 1965. It can have foreseen no such consequence of *Allen* when it amended the Voting Rights Act in 1970, 1975 and 1982. The record before this Court shows that the Department of Justice has never perceived any such requirement in the Act, nor has any court. This Court should note probable jurisdiction and should reverse the judgment of the District Court.

**II. Past changes in North Carolina's judiciary should not be subject to the preclearance requirements of §5 of the Voting Rights Act, in light of the special circumstances of the case.**

**A. Past representations of the United States Attorney General require an equitable application of §5.**

The State of North Carolina seriously contests the District Court's holding that the State must now scuttle numerous legislative enactments relating to its judicial system, some of which have been in effect since 1965, unless the State submits or "unambiguously" resubmits those enactments to the United States Attorney General and obtains their preclearance. Even if submission of the enactments in issue is ultimately held by this Court to be required, the particular circumstances surrounding the present case and surrounding the State's past actions relative to the requirements of §5 present a unique situation and give rise to the need for a special assessment of the situation by this Court.

Already the State has fully discussed the import of cases like *Holshouser v. Scott,* 335 F. Supp. 928 (M.D.N.C. (1971), aff'd, 409 U.S. 807 (1972), to the issues of this case.

The issues examined in *Holshouser* were, of course, different from those presently before the Court; but the reasoning employed by the Court in that case, at a time when considerable confusion existed as to Congress' intended application of the Voting Rights Act, is closely wed to, and is critical to this Court's understanding of, the State's position in the present case.

The special distinction between officials elected to serve in a judicial capacity and those elected to serve in a representative capacity was not only of significance to those concerned with equality of the vote in the numerical sense. The distinction was considered to be more general, and, to some extent, fostered the notion that, anytime an electoral method was scrutinized, the degree of scrutiny had to be somewhat tempered by special considerations if court officials were involved. Simply put, judges were different; they didn't represent people; and, in election matters, the same "rules" didn't apply. That reasoning, for good cause, persists today; but its importance to the present case lies in its prevalence in the late 1960s and early 1970s.

The notion was clearly not foreign to federal officials at that time—certainly not those charged with the interpretation and enforcement of §5. As was the case among officials in jurisdictions covered by the Act, there was confusion and disagreement among federal officials as to Congress' intentions in its enactment of the Voting Rights Act. One prevailing feeling, however, was that §5 was intended to apply only in situations where elections changes related to officials serving in representative capacities, as the Leonard affidavit states. App. at A-13. This is most compellingly demonstrated by the Attorney General's response to a §5 submission of 1967 election law enactments made on February 18, 1971, by Alex K. Brock, Executive Secretary-Director, State Board of Elections. App. at A-48. In response to Brock's submission, David L. Norman, Acting Assistant Attorney General, Civil Rights Division, indicated that no objection would be interposed to the enactments, with the qualification that the Attorney General required further information regarding the enactment of Chapter

1063, Session laws of 1967 (legislation providing for numbered seats in some legislative districts).[3] Norman then concluded his letter as follows:

> "Also, I must advise you that there were several statutes submitted, *such as the changes in the North Carolina Court System, which did not deal with voting practices or procedures and, thus, are not subject to Section 5 of the Voting Rights Act. These amendments to existing laws were not reviewed by this Division,* and because Section 5 does not cover an enactment unless it changes in some way the previously existing statute, I have not reviewed those portions of Chapter 163 of the North Carolina Code which were not altered." [Emphasis added.] App. at A-49.

As the Brock affidavit shows, Norman could only have been referring to Chapter 1049, Session Laws of 1967, a part of that submission. App. at A-16. That legislation, indeed, included numerous provisions relating to the administration of the State's court system which in no way related to elections practices or procedures. However, the legislation clearly indicated on its face that it did affect the boundaries of solicitorial districts and terms of solicitors. As indicated by the Hinsdale affidavit, the legislation altered numerous solicitorial districts—districts from which the solicitors were elected. App. at A-11. By present-day standards, nothing else showing, these alterations of district boundaries might well have been thought to constitute a proper item for review by the Attorney General. *See,* 28 C.F.R. 51 at §51.12(e). Yet the Attorney General specifically denoted such changes to be matters not subject to §5 review requirements. Further, the evidence supports the fact that Norman intended for his statement to be taken literally. The affidavit of Jerris Leonard (App. at A-13), who served as Assistant Attorney General, Civil Rights Division, at a time just preceding the Norman correspondence, not only corroborates statements in the Brock affidavit to the effect that compliance with §5 was made difficult by the uncertainty of federal officials as to what the Act intended (App. at A-15), but also indicates that those officials were

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[3]The Norman letter does not indicate by date that it responds to the February 18, 1971, submission, but its reference to Chapter 1063, Session Laws of 1967, and to other 1967 enactments, makes that fact conclusive.

advertant to and influenced by concepts similar to those set out in *Holshouser, supra.* Judicial officers, solicitors and judges, though elected by the people, did not serve the people in a representative capacity.[4] That being the case, the Attorney General apparently felt that matters pertaining to the method of electing them were not within the ambit of §5.

It is the Norman letter which is the cause of the State's present dilemma. The record in this case is replete with evidence of the State's efforts to comply with what it perceived to be the requirements of §5 since the enactment of the Voting Rights Act. The Brock affidavit, filed by the State, indicates that he personally made every effort to satisfy the Act's requirements. Throughout 1966 and into early 1967, he travelled frequently to Washington and met with officials in the Civil Rights Division, hand delivering matters he thought subject to review. App.at A-15.

In 1970, however, a three-judge court in *Clayton v. North Carolina State Board of Elections,* 317 F. Supp. 915 (E.D.N.C. 1970), ruled his early efforts to comply with §5 insufficient. Plaintiffs in that case alleged that a 1969 legislative enactment, essentially prohibiting electioneering within 500 feet of polling places in certain counties covered by §5, had never been submitted to the Attorney General, nor had an action been commenced by the State or any of its political subdivisions in the United States District Court for the District of Columbia, as provided by §5. An affidavit of Brock, submitted in that action by the State to prove submission, indicated that he had either mailed or hand-delivered to the Attorney General copies of the North Carolina Election Laws in their entirety before and after the 1967 and 1969 sessions of the General Asembly. Evidence, however, was introduced by Plaintiffs showing that the United States Department of Justice had no evidence of the submissions on file.

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[4] *Holshouser* equated judges and prosecutors, as far as election matters were concerned, quoting *Stokes v. Fortson,* 234 F. Supp. 575 (N.D. Ga. 1964):

> Manifestly, judges and prosecutors are not representatives in the same sense as are legislators or the executive. Their function is to administer the law, not tc espouse the cause of a particular constituency.

335 F. Supp. at 931.

The District Court determined the enactment in issue to be unenforceable, since no evidence of its submission and preclearance could be found in the United States Department of Justice files.

Following the ruling in *Clayton*, Brock resorted to written submissions exclusively following a format for which United States Department of Justice officials expressed a preference and routinely made written submissions of all legislation which he thought to be covered by § 5. App. at A-15.

Submissions by Brock of changes relating to the election of the State's judges, however, were sporadic. Chapter 262, Session Laws of 1965, was not submitted as a separate enactment, but its provisions were included in Chapter 775, Session Laws of 1967, which was submitted in 1971. Chapter 997, Session Laws of 1967, was not submitted separately, but its provisions were included in Chapter 1190, Session Laws of 1969, which was also submitted in 1971.[5] The State concedes that neither Chapters 1119, 1130, and 1238, Sessions Laws of 1977 nor Chapter 1109, Session Laws of 1983, have ever been submitted to the Attorney General; no action regarding them has ever been filed in the United States District Court for the District of Columbia. Yet the Brock Affidavit indicates that his actions were greatly influenced by the Norman letter of 1971.[6] Largely as a result of the Norman letter, he came to view changes in methods of election of North Carolina judges as items not required by §5 to be submitted to the Attorney General.

To the extent that North Carolina failed, after its submissions of Chapter 775, Session Laws of 1967, and Chapter 1190, Sessions Laws of 1969 in 1971, to supplement earlier submissions by later making specific submissions of Chapter 262, Session laws of 1965 and Chapter 997, Session Laws of 1967, what was its

---

[5] Defendants contend that these two submissions, all considered, were adequate, especially the submission of Chapter 262. Chapter 775 contained its provisions and indicated clearly that it embodied a total rewrite of Chapter 163. App. at A-16.

[6] It is of no small significance that the letter postdated the decision in *Allen v. Board of Elections, supra*, requiring approval of state enactments altering election laws "in even a minor way."

incentive to do so, and upon what should the State have founded a perception that it should do so, in light of the Attorney General's gratuitous instruction that submission was not required? The State has never submitted Chapters 1119, 1130, and 1238, Session Laws of 1977 or Chapter 1109, Session laws of 1983, but what should have influenced it to submit those laws?

If jurisdictions covered by the Act are to escape continued treatment which transcends the inequitable, this court must acknowledge in a meaningful way that officials in jurisdictions covered by § 5 give great weight to the manner in which federal officials interpret that provision. The familiarity of those officials with the Voting Rights Act and the forces behind its inception has even caused their construction of it to be weighed heavily by this court:

> "...Given the central role of the Attorney General in formulating and implementing §5, this interpretation of its scope is entitled to particular deference. *United States v. Board of Cmm'rs. of Sheffield,* 435 U.S., at 131, 98 S. Ct., at 979; *Perkins v. Matthews,* 400 U.S., at 391, 91 S. Ct., at 438. *See Georgia v. United States,* 411 U.S., at 536-539, 93 S. Ct., at 1708-1710."

*Doughtery County, Georgia, Board of Education, et al., v. White,* 439 U.S. 32, 39-40 (1978).

North Carolina, in 1971, received the Attorney General's opinion regarding changes in election laws relating to the judiciary; it has never received a retraction. The Voting Rights Act has never been held to apply retroactively, *See Hereford Independant School Dist. v. Bell,* 454 F. Supp. 143 (D.C. Tex. 1978). Even if the present case leads to a seminal holding requiring the submission of all election law changes affecting the State's judges and district attorneys, then that holding, in light of the particular facts surrounding this controversy, should not result in a virtual retroactive application of § 5 to the enactments in issue. At most, the District Court's ruling should only have had prospective effect. Reliance on past representations made by the Attorney General should count for something.

**B. At least portions of the enactments in issue have been submitted and approved.**

If this Court determines that the facts of this case in no way diminish the requirements that North Carolina submit Chapters 1119, 1130, and 1238, Session Laws of 1977 and Chapter 1109,

Session Laws of 1983, the Court should still find that the State has satisfied its statutory obligation to submit Chapter 262, Session Laws of 1965 and Chapter 997, Session Laws of 1967. True, *McCain v. Lybrand*, 465 U.S. 236 (1984), is conclusive in its requirement that any covered jurisdiction submit all changes in its election practices to the Attorney General in a clear and unambiguous fashion. The requirements of the decision are as stringent as it recognizes the preclearance process to be. But even *McCain* implicitly recognizes that peculiar facts surrounding a particular case might provide the basis for a different holding:

> "To the extent there was any ambiguity in the scope of the preclearance request, the structure and purpose of the preclearance requirement plainly counsel against resolving such ambiguities in favor of the submitting jurisdiction *in the circumstances of this case.* (Emphasis added.) 465 U.S. at 39-40.

North Carolina's actions with respect to the enactments in issue can in no way be equated with the "attempts to circumvent the protections afforded by the Act" against which *McCain* intended to guard. The reasons for the State's past actions have been revealed. This Court should note probable jurisdiction, in light of those reasons.

## CONCLUSION

For these reasons heretofore discussed, the Court should note probable jurisdiction.

Respectfully submitted,

LACY H. THORNBURG
ATTORNEY GENERAL,
STATE OF NORTH CAROLINA

*James Wallace, Jr.
Assistant Attorney General
Office of the Attorney General
Post Office Box 629
Raleigh, North Carolina 27602
Telephone: (919) 733-7218

Attorneys for Appellants
*Counsel of Record

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this day served three (3) copies of the foregoing Jurisdictional Statement upon the persons indicated below by depositing same in the United States mail, first-class postage prepaid, addressed to the following:

Mr. Allen Foster
Mr. Kenneth Gumbiner
Attorneys at Law
P. O. Drawer 20004
Greensboro, NC 27420

This the 6th day of December, 1985.

JAMES WALLACE, JR.
Assistant Attorney General
State of North Carolina

No. 85-1066

Supreme Court, U.S.
FILED
DEC 6 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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JAMES G. MARTIN, *et al.*,
*Appellants,*

*v.*

TERRY L. HAITH,
*Appellee.*

---

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

---

# APPENDIX

---

LACY H. THORNBURG
Attorney General,
State of North Carolina

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# APPENDIX A

## United States District Court

EASTERN DISTRICT OF NORTH CAROLINA

Raleigh Division

---

**No. 84-1319-CIV-5**

---

TERRY L. HAITH,
*Plaintiff,*

*v.*

JAMES G. MARTIN, *et al.*,
*Defendants.*

---

## ORDER

In accordance with the Memorandum Opinion of this court filed today, and with the concurrence of Judge Phillips and Judge Dupree, it is hereby ORDERED, ADJUDGED and DECREED that defendants be, and they are hereby, restrained and enjoined from conducting any elections pursuant to the laws listed below unless and until the same have been approved by the Attorney General of the United States or the United States District Court for the District of Columbia, as required by Title 42 United States Code § 1973c:

Chapter 262, Session Laws of 1965
Chapter 997, Session Laws of 1967
Chapters 1119, 1130 and 1238, Session Laws of 1977
Chapter 1109, Session Laws of 1983.

This 27 September 1985.

FOR THE COURT:

/s/ W. EARL BRITT
United States District Judge

# APPENDIX B

## United States District Court

EASTERN DISTRICT OF NORTH CAROLINA

Raleigh Division

---

**No. 84-1319-CIV-5**

---

Filed: September 27, 1985

TERRY L. HAITH,
*Plaintiff,*

*v.*

JAMES G. MARTIN, *et al.*,
*Defendants.*

---

## MEMORANDUM OPINION

---

Before PHILLIPS, Circuit Judge, BRITT, Chief District Judge, and DUPREE, Senior District Judge.

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BRITT, Chief District Judge:

This action was instituted under the Voting Rights Act of 1965, 42 U.S.C. § 1973 (the Act), seeking to enjoin the election of superior court judges in North Carolina in accordance with acts of the General Assembly which have not been precleared as required by section 5 of the Act. 42 U.S.C. § 1973c. As required by 28 U.S.C. § 2284, Chief Judge Winter designated a three-judge panel to hear and determine the controversy. The matter is now before the court on cross-motions for partial summary judgment, a hearing on said motions having been held in Wilmington, North Carolina, on 16 September 1985.

### I.

Plaintiff is a black citizen and registered voter of Guilford County. The named defendants are state officials of North Carolina, all sued in their official capacities.

## II.

The court has jurisdiction pursuant to 42 U.S.C. § 1973c and 28 U.S.C. § 2284.

## III.

The following facts are not in dispute:

1. On 1 November 1964 North Carolina had a total of thirty judicial districts, twenty-eight of which were served by one judge each, with the remaining two being served by two judges each. Judges within all districts were elected simultaneously for eight-year terms.

2. On 1 November 1964 candidates for the office of superior court judge in judicial districts having more than one judge were not required to announce for which vacancy he or she was filing nor did any district have staggered terms for judges within the district.

3. In 1965 the North Carolina General Assembly enacted Session Law Chapter 262 which amended N.C. Gen. Stat. § 163-147 (now N.C. Gen. Stat. § 163-106(d) (1982)) and established a system of numbered seat elections for the position of superior court judge in districts with two or more vacancies in any judicial district. 1965 N.C. Sess. Laws 262.

4. In 1967 the North Carolina General Assembly enacted Session Law Chapter 997 which provided for an additional resident judge in the 12th, 18th, 19th and 28th judicial districts to serve eight-year terms staggered from the positions already in existence in those districts. 1967 N.C. Sess. Laws 997.

5. In 1977 the North Carolina General Assembly enacted Session Laws Chapter 1119, which provided for an additional resident judge in the 3rd, 10th, 12th, 14th, 19th, and 20th judicial districts to serve eight-year terms staggered from the positions already in existence in those districts. 1977 N.C. Sess. Laws 1119.

6. In 1977 the North Carolina General Assembly enacted Session Laws Chapters 1130 and 1238 creating judicial districts 15A and 15B out of former district 15; creating judicial districts 19A and 19B out of former district 19; and, creating judicial districts 27A and 27B out of former district 27, thereby altering

the districts from which candidates for the office of superior court judge in those districts were nominated. 1977 N.C. Sess. Laws 1130 and 1238.

7. In 1983 the North Carolina General Assembly enacted Session Laws 1109 which provided for additional judges in judicial districts 1, 9, 18 and 30. 1983 N.C. Sess. Laws 1109.

8. Forty of the one hundred counties in North Carolina are subject to section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973.

9. Elections of superior court judges in the forty counties which are covered by section 5 of the Voting Rights Act of 1965 are affected by the acts of the legislature above referred to.

## IV.

Defendants must submit "any voting qualification or prerequisite to voting, or standard, practice, or procedure . . . different from that in force or effect on November 1, 1964," to the Attorney General for preclearance or institute an action in the United States District Court for the District of Columbia for a declaratory judgment that any such qualification or prerequisite to voting, or standard, practice or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. 42 U.S.C. § 1973c. Defendants admit that Chapters 1119, 1130, and 1238 of the Session Laws of 1977 and Chapter 1109 of the Session Laws of 1983 have not been precleared. They contend, however, that Chapter 997 of the Session Laws of 1967 and Chapter 262 of the Session Laws of 1965 have been precleared because they were included in later enactments of the General Assembly which were submitted to, and approved by, the Attorney General. In addition, defendants contend that section 5 was not intended by Congress to apply to the election of judges and that their failure to preclear the subject enactments was the result of representations made to state officials by the office of the Attorney General. The contentions will be addressed separately.

**A. Does section 5 apply to the election of judges?**

Defendants base their contention that it does not apply to the election of judges on the case of *Holshouser v. Scott,* 335 F. Supp. 928 (M.D.N.C. 1971), *aff'd,* 409 U.S. 807 (1972). In that case the practice of nominating candidates for superior court judgeships in North Carolina on a districtwide basis and electing them on a statewide basis was challenged as being violative of the due process clause of the 14th Amendment to the Constitution of the United States. The majority of a three-judge panel held that the practice was not constitutionally infirm stating that the one-man, one-vote rule did not apply to the state judiciary. Defendants' reliance on *Holshouser* is misplaced as it in no way dealt with, or attempted to interpret, the Voting Rights Act of 1965. In fact, neither the majority nor the dissent mentioned the Voting Rights Act of 1965.

Defendants seek to draw on the distinction made in *Holshouser* between those in the legislative branch of government who represent their constituents in the making of laws and those in the judicial branch who do not represent a constituency but, rather, interpret the law. Discounting the interesting jurisprudential arguments arising from such an attempted distinction, *see, Holshouser,* 335 F. Supp. at 934 (Craven, J. dissenting), it is quite clear that no such distinction can be attributed to the Act. The Act provides:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color . . . . 42 U.S.C. § 1973.

As can be seen, the Act applies to all *voting* without any limitation as to who, or what, is the object of the vote. The cases presented to the courts have dealt with what constitutes a "standard, practice, or procedure." Thus, in *Dougherty County, Georgia, Board of Education v. White,* the Supreme Court held that a newly enacted rule requiring employees seeking public office to take unpaid leaves of absence while campaigning was a "standard, practice, or procedure" requiring preclearance under section 5. 439 U.S. 32 (1978). The Court said that Congress meant "to reach any state enactment which

altered the election law of a covered State in even a minor way." 439 U.S. at 37, *quoting Allen v. State Board of Elections,* 393 U.S. 544 (1969).

We hold that the fact that an election law deals with the election of members of the judiciary does not remove it from the ambit of section 5.

**B. Were Chapters 997 of the Session Laws of 1967 and 262 of the Session Laws of 1965 precleared by inclusion in later enactments of the General Assembly?**

Guidelines for submissions to the Attorney General for preclearance under section 5 have been set forth in 28 C.F.R. part 51. Section 51.25, entitled "Required Contents," states:

> Each submission should contain the following information or documents to enable the Attorney General to make the required determination pursuant to Section 5 with respect to the submitted change affecting voting: . . . (b) if the change affecting voting is not readily apparent on the face of the document provided under paragraph (a) or is not embodied in a document, a clear statement of the change explaining the difference between the submitted change and the prior law or practice, or explanatory materials adequate to disclose to the Attorney General the difference between the prior and proposed situation with respect to voting.

28 C.F.R. § 51.25 (1984). Defendants do not challenge plaintiff's contention that they did not comply with these guidelines. Nor do they challenge plaintiff's contention that the transmittal letters in which the statutes were enclosed did not even mention Chapter 252, Session Laws of 1965 or Chapter 997, Session Laws of 1967.

The Supreme Court in *McCain v. Lybrand* rejected a contention similar to that advanced by defendants here. ____ U.S. ____, 104 S. Ct. 1037 (1984). In so doing the Court said: "When a jurisdiction adopts legislation that makes clearly defined changes in its election practices, sending that legislation to the Attorney General merely with a general request for preclearance pursuant to § 5 constitutes a submission of the

changes made by the enactment and cannot be deemed a submission of changes made by previous legislation which themselves were independently subject to § 5 preclearance." 104 S. Ct. at 1049.

On the facts presented we hold that Chapter 262, Session Laws of 1965 and Chapter 997, Session Laws of 1967 have not been precleared as required by section 5 of the Voting Rights Act of 1965.

**C. Was the failure of defendants to obtain preclearance of the statutes in question the result of representations made to state officials by the office of the Attorney General?**

Defendants submitted to the Attorney General for preclearance certain enactments of the 1967 session of the General Assembly of North Carolina. In a letter to the Executive Secretary of the North Carolina State Board of Elections dated 23 April 1971, Acting Assistant Attorney General David L. Norman stated: ". . . I must advise you that there were several statutes submitted, such as the changes in the North Carolina court system, which did not deal with voting practices or procedures and, thus, are not subject to Section 5 of the Voting Rights Act. . . ."

Defendants contend that the Norman letter is "the cause of the State's present dilemma" and that equitable principles should cause this court to sanction the failure to seek preclearance of legislation dealing with the election of judges. Thus, the state contends that even if this court holds, as we must, that section 5 does apply to elections of members of the judiciary our decree should be prospective only. The court disagrees. It does appear that great efforts were made by the Executive Secretary of the State Board of Elections to comply with the requirements of the Voting Rights Act of 1965. Nevertheless, the Act does not give this court the power to provide equitable relief to defendants, no matter how just their cause. *See,* 42 U.S.C. § 1973c.

By the very terms of the statute, covered changes in election laws may not be put into effect until they have either been precleared by the Attorney General or approved by the United

States District Court for the District of Columbia. Indeed, they are not "effective as laws until and unless [they are] cleared pursuant to § 5." *McCain v. Lybrand,* ____ U.S. ____, 104 S. Ct. at 1044, *quoting Conner v. Waller,* 421 U.S. 656 (1975).

Defendants have not challenged plaintiff's contentions that each of the statutes in question deals with a "standard, practice, or procedure with respect to voting." Since the statutes in question provide for designated seats in multi-member districts, staggered terms and changes in the boundaries or make-up of voting districts, we hold that they are subject to the section 5 preclearance requirements.

It follows that plaintiff is entitled to the injunctive relief sought. An order providing that relief will issue.

This 27 September 1985.

FOR THE COURT:

/s/ W. EARL BRITT
United States District Judge

# APPENDIX C

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NORTH CAROLINA**
**RALEIGH DIVISION**

| | | |
|---|---|---|
| TERRY L. HAITH, | ) | No. 84-1319-DIV-5 |
| | ) | |
| *Plaintiff* | ) | |
| | ) | |
| v. | ) | |
| JAMES G. MARTIN, *et al.*, | ) | |
| | ) | |
| *Defendants.* | ) | |

## NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that James C. Martin, *et al,* defendants in the above-captioned action, hereby appeal to the Supreme Court of the United States from the final order and injunction entered in this action on 27 September, 1985.

This appeal is taken pursuant to 28 U.S.C. Sec. 1253 and 42 U.S.C. Sec. 1973 c.

This the 4 day of October, 1985.

LACY H. THORNBURG
ATTORNEY GENERAL

---

James Wallace, Jr.
Assistant Attorney General
Attorney General's Office
Post Office Box 629
Raleigh, North Carolina 27602
Telephone: (919) 733-7218

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing Defendants' Notice of Appeal to the Supreme Court of the United States to:

Mr. C. Allen Foster
Turner, Enochs & Sparrow, P.A.
Attorneys at Law
Post Office Drawer D
Greensboro, North Carolina 27402

by placing a copy of same in the United States Post Office, postage prepaid.

This the 4 day of October, 1985.

_____

James Wallace, Jr.

# APPENDIX D

## AFFIDAVIT

Charles Edwin Hinsdale, being first duly sworn, on the basis of his personal knowledge, deposes and says:

1. I am a Professor Emeritus of the Institute of Government, Chapel Hill, North Carolina.

2. From 1961 until 1981, I served at the Institute of Government as a Professor of Public Law and Government and as Assistant Director of the Institute.

3. During that period, my primary field of specialization was North Carolina's Judicial System, my responsibilities having included the teaching of continuing education courses for trial judges, clerks of court, magistrates and public defenders. I also worked extensively with the North Carolina Courts Commission and wrote virtually every Commission Report from 1965 until 1969. I also drafted nearly all legislation embodying suggestions contained in the Commission's Reports.

4. I drafted the Commission Report which immediately preceded the enactment of Chapter 1049, Session Laws of 1967; I also drafted Chapter 1049. Prior to drafting either of those, I thoroughly researched the status of solicitorial and judicial districts in North Carolina and became familiar with the number and the boundaries of each.

5. The enactment of Chapter 1049, Session Laws of 1967, corrected a sizeable discrepancy which existed between the number of solicitorial districts and the number of judicial districts in the State. Its enactment changed the boundaries of numerous solicitorial districts, and, therefore, the electoral districts of numerous solicitors.

8. Some of these changes occurred in North Carolina counties which were at the time, and which remain, subject to the preclearance requirements contained in §5, Voting Rights Act of 1965,

1965, as amended, 42 USC §1973c.

Further, your affiant sayeth not.

_____

Charles Edwin Hinsdale
Affiant

Subscribed and sworn to before
me this 20th day of May, 1985.

_____

Notary Public

My Commission Expires: _____

# APPENDIX E

## AFFIDAVT

Washington )
) ss
District of Columbia )

Jerris Leonard, being first duly sworn on oath, deposes and states:

1. That from approximately January 1969 through April 15, 1971, he was the Assistant Attorney General in charge of the Civil Rights Division of the Department of Justice, and as such, was familiar with the policy of the Department with respect to the enforcement of Section 5 of the Voting Rights Act of 1965.

2. That during said period of time, there was considerable doubt, discussion and disagreement within the Civil Rights Division of the Department of Justice with respect to the reach of the Voting Rights Act, and indeed, on a number of occasions, the Department of Justice, through the Division, took positions interpreting the Act far more restrictively that what the courts eventually decided was the reach of Section 5.

3. Included among the doubts and concerns was whether or not Section 5 of the Voting Rights Act of 1965 applied to judicial and prosecutorial districts and elections, as these offices were not representational in the context of members of the state legislatures, common councils, county boards and commissions.

4. Your Affiant has reviewed a letter dated April 23, 1971, addressed to Mr. Alex K. Brock, Executive Secretary, North Carolina State Board of Elections and signed by David L. Norman, Acting Assistant Attorney General, Civil Rights Division of the U.S. Department of Justice, and with specific reference to the ultimate paragraph, and more specifically the language contained therein stating that a number of the Acts submitted by North Carolina relating to its court system, "are not subject to Section 5 of the Voting Rights Act," when in fact, a review of the Act submitted, *i.e.*, Chapter 1049, would today, have been required to be submitted and precleared under Section 5 of the Voting Rights Act, such position taken by Norman could easily

be read, in light of its context, to exclude the necessity of submitting legislation relating to the voting districts, terms of office, etc., of judges and/or prosecutors (solicitors). Such a determination was, in fact, not inconsistent with positions taken by the Department of Justice at or about that period of time.

Executed at Washington, D.C. this 14th day of May, 1985.

Jerris Leonard

SUBSCRIBED and sworn to before me this 14th day of May, 1985.

Notary Public
My Commission Expires 3/88

# APPENDIX F

## AFFIDAVIT

Alex K. Brock, being first duly sworn, on the basis of his personal knowledge deposes and says:

1. I am the Executive Secretary-Director of the State Board of Elections of North Carolina and have served continuously in each capacity since my initial appointment in July 1965.

2. Since that date, I have made every effort to comply with the submission requirements of Section 5, Voting Rights Act, as amended, 42 USC 1973(c).

3. Following the passage of the Voting Rights Act, I made numerous trips to the Office of the United States Attorney General to confer with members of the staff there as to the requirements of the Act, visiting numerous times, once every four to six weeks, in 1966 and early 1967.

4. Initially, my submissions of changes in North Carolina's elections laws were made by hand delivery or by mail, without explanatory cover correspondence.

5. Following the decision in *Clayton v. North Carolina State Board of Elections,* 317 F.Sup. 915 (E.D.N.C. 1970), which determined my earlier submissions to have been inadequate, I resorted to a method of written submissions whereby I would include all election law changes, designating each by chapter number and year in letters to the Attorney General, attaching thereto a copy of each piece of legislation to which I had referred, as is clearly stated in the "Certificate of Service" executed by me in each letter of submission.

6. The method of submission employed by me was developed through numerous conferences with Department of Justice officials, who expressed preference for the method, which I still employ, in that I have never received a complaint regarding, or objection to, that method.

7. On February 18, 1971, I sent two submission letters to the United States Attorney General, one itemizing elections laws enacted by the North Carolina General Assembly in 1967 and one itemizing elections laws enacted in 1969. I attached to each copies of the legislation to which I referred in the letters.

8. I have attached hereto copies of each of those letters, retrieved from files in my official custody. I did not retain copies of the legislation in my files, but have provided new copies of those which are pertinent to the litigation in connection with which this Affidavit has been prepared. The letter containing 1967 changes is marked as Attachment 'A' and the letter containing 1969 changes is marked Attachment 'B'.

9. I have included with Attachment 'A' copies of Chapter 775 and 1049, Sessions Laws of 1967. I include Chapter 775, because it contains the same provision initially enacted as Chapter 262, Session Laws of 1965 (Attachment E). Chapter 775 indicates clearly that it is a rewrite of Chapter 163 of the North Carolina General Statutes (Election Laws). I include Chapter 1049 because it provided changes in the boundaries of numerous solicitorial districts. Chapters 775 and 1049 were the only submitted 1967 enactments which in any way related to election of judges or solicitors.

10. I have included with Attachment 'B' a copy of Chapter 1190, Session Laws of 1969, because it contains the same provisions initially enacted as Chapter 997, Session Laws of 1967 (Attachment F).

11. I intended for my submission of Chapter 775, Session Laws of 1967, to serve as a submission of the provisions of Chapter 262, Session Laws of 1965; and I intended for my submission of Chapter 1190, Session Laws of 1969 to serve as a submission of the provisions of Chapter 997, Session Laws of 1967.

12. I received a response to each letter from the United States Department of Justice, one response dated April 20, 1971, and one response dated April 23, 1971. (Attachments 'C' and 'D' respectively).

13. The April 23, 1971, response is clearly intended as a response to my letter including 1967 legislation, because it refers to Chapter 1063, Session Laws of 1967, to which my letter also referred.

14. Both letters made reference to legislation in some way affecting election of judges or solicitors.

15. The April 20, 1971, response approved all submitted enactments relating to the State's judiciary and all other legislation as well, except for Chapter 750, Session Laws of 1969, which

imposed literacy requirements in connection with voter registration.

16. The April 23, 1971, response approved all submitted legislation, with the exception of Chapter 1063, Session Laws of 1967, relating to numbered seats, and with the further exception of submitted legislation which in part changed solicitorial district boundaries by requiring them to be coterminous with the boundaries of judicial districts. The letter advised me that "changes in the North Carolina court system were not subject to Section 5 of the Voting Rights Act" and thus had not been reviewed.

17. I took the letter of April 23rd at face value and accepted the determination of the United State's Attorney General that changes in the court system were not subject to Section 5.

18. Subsequently, my submission of elections legislation affecting the judiciary were sporadic, in what I believed that were unnecessary, because of the letter of April 23, 1971.

19. I normally made independent judgments as to whether legislation needed to be submitted under Section 5, without conferring with the State's attorneys, but on occasion, if one of those attorneys would specifically mention new legislation affecting election of Judges and request that it be submitted out of an abundance of caution, I would submit that legislation.

20. The attachments to which I have referred, Attachments A-F, are incorporated into this Affidavit as if a part hereof.

Executed at Raleigh, North Carolina, this the 16th day of May, 1985.

Alex K. Brock
Executive Secretary-Director
State Board of Elections

STATE OF NORTH CAROLINA

COUNTY OF WAKE

Sworn to and subscribed to before me this 16th day of May, 1985.

_____
Notary Public

My commission expires: October 31, 1989.

**ATTACHMENT A**

February 18, 1971

Honorable John N. Mitchell
United States Attorney General
Justice Department
Washington, D.C.

Re: Submission of Election Laws;
State of North Carolina;
effected by 1967 General Assembly

Dear Mr. Mitchell:

Pursuant to the provisions of Section 5 of the Voting Rights Act of 1965 (Public Law 89-110), as amended in 1970, we submit the following documents relating to Chapter 163 of the General Statutes of North Carolina as the same was amended by Acts passed during the 1967 Session of the North Carolina General Assembly:

1. Chapter 761 - SL 1967
2. Chapter 775 - SL 1967
3. Chapter 851 - SL 1967
4. Chapter 952 - SL 1967
5. Chapter 1049 - SL 1967
6. Chapter 1063 - SL 1967
7. Chapter 1264 - SL 1967

8. Chapter 1270 - SL 1967
9. Chapter 1271 - SL 1967
10. 1963 Election Laws
11. 1966 Election Laws
12. 1967-1968 Election Laws
13. Report of Election Laws Revision Commission to the General Assembly of 1967

Honorable John N. Mitchell

February 18, 1971

Very truly yours,

Alex K. Brock
Executive Secretary

## CERTIFICATE OF SERVICE

The undersigned certifies that he has served the foregoing Statement together with copies of the Acts and Amendments listed, along with copies of the 1963 Election Laws, the 1966 Election Laws, the 1967-1968 Election Laws, the 1970-1971 Election Laws of the State of North Carolina and the Report of the Election Laws Revision Commission to the General Assembly of 1967, on the Honorable John N. Mitchell, U.S. Attorney General, Justice Department, Washington, D.C., by depositing same in the U.S. Mail, Registered Mail with Return Receipt Requested, postage prepaid.

The 18th day of February, 1971.

_____

Executive Secretary, N.C. State Board of Elections

ATTEST:

_____

Notary Public

**Chapter 775, (North Carolina) Session Laws of 1967**

*Note:* Because of the voluminous nature of Chapter 775, the full text of the enactment is not included herein, because it is unnecessary to a determination of the issues under consideration herein. It is available from the record.

The portion of Chapter 775 which includes the provision originally enacted as Chapter 262, North Carolina Session Laws of 1965, is N.C. Gen.Stat. §163-106(d) and reads as follows:

(d) Notice of Candidacy for Certain Offices to Indicate Vacancy. In any primary in which there are two or more vacancies for Chief Justice and associate Justices of the Supreme Court, or two vacancies for United State Senator from North Carolina, or two or more vacancies for the office of Superior Court Judge to be filled by nominations, each candidate shall, at the time of filing notice of candidacy, file with the State Board of Elections a written statement designating the vacancy to which he seeks nomination. Votes cast for a candidate shall be effective only for his nomination to the vacancy for which he has given notice of candidacy as provided in this subsection.

A person seeking party nomination for a specialized district judgeship established under §7A-147 shall, at the time of filing notice of candidacy, file with the State Board of Elections a written statement designating the specialized judgeship to which he seeks nomination.

**Chapter 1049, (North Carolina) Session Laws of 1967**

S. B. 308 **CHAPTER 1049**

AN ACT TO MAKE SOLICITORIAL DISTRICTS IDENTICAL WITH SUPERIOR COURT JUDICIAL DISTRICTS, TO PROVIDE THAT THE OFFICE OF SOLICITOR SHALL BE A FULL-TIME OFFICE, TO PROVIDE THAT SOLICITORS SHALL PROSECUTE ALL CRIMES IN THE SUPERIOR AND DISTRICT COURTS OF THE STATE, TO ABOLISH THE OFFICE OF DISTRICT COURT PROSECUTOR, AND FOR OTHER PURPOSES.

*The General Assembly of North Carolina do enact:*

**Section 1.** The following new article is hereby inserted in Subchapter III of Chapter 7A of the General Statutes:

"Article 9. Solicitors and Solicitorial Districts

**Sec. 7A-60.** Solicitors and Solicitorial Districts. Effective January 1, 1971, the State shall be divided into solicitorial districts, the numbers and boundaries of which shall be identical with those of the superior court judicial districts. In the general election of November, 1970, a solicitor shall be elected for a four-year term for each solicitorial district. The solicitor shall be a resident of the district for which elected, and shall take office on January 1 following his election. A vacancy in the office of solicitor shall be filled as provided in Article IV, Section 17 of the Constitution.

**Sec. 7A-61.** Duties of Solicitor. The solicitor shall prosecute in the name of the State all criminal actions requiring prosecution in the superior and district courts of his district, advise the officers of justice in his district, and perform such duties related to appeals to the Appellate Division from his district as the Attorney General may require. Each solicitor shall devote his full time to the duties of his office and shall not engage in the private practice of law.

**Sec. 7A-62.** Acting Solicitor. When a solicitor becomes for any reason unable to perform his duties, the Governor shall appoint an acting solicitor to serve during the period of disability. An acting solicitor has all the power, authority and duties of the regular solicitor. He shall take the oath of office prescribed for the regular solicitor, and shall receive the same compensation as the regular solicitor.

**Sec. 7A-63.** Assistant Solicitors. Each solicitor shall be entitled to the number of full-time assistant solicitors set out in G.S. 7A-133, to be appointed by the solicitor, for the same term of office as the solicitor. A vacancy in the office of assistant solicitor shall be filled in the same manner as the initial appointment, for the remainder of the unexpired term. An assistant solicitor shall take the same oath of office as the solicitor, and shall perform such duties as may be assigned by the solicitor. He shall devote his full time to the duties of his office and shall not engage in the private practice of law during his term.

**Sec. 7A-64.** Temporary Assistance When Dockets Overcrowded. When criminal cases accumulate on the dockets of the superior or district courts of a district beyond the capacity of the solicitor and his full-time assistants to keep the dockets reasonably current, the Administrative Officer of the Courts may, on request of the solicitor, supported by facts indicating the need for assistance:

(1) temporarily assign an assistant solicitor from another district, after consultation with the solicitor thereof, to assist in the prosecution of cases in the requesting district; or

(2) authorize the temporary appointment, by the requesting solicitor, of a qualified attorney to assist the requesting solicitor.

The length of service and compensation of such temporary appointee shall be fixed by the Administrative Officer of the Courts in each case.

**Sec. 7A-65.** Compensation and Allowances of Solicitors and Assistant Solicitors. The annual salary of solicitors and full-time assistant solicitors shall be as provided in the Budget Appropriations Act. When traveling on official business, each solicitor and assistant solicitor is entitled to reimbursement for his subsistence and travel expenses to the same extent as State employees generally.

**Sec. 7A-66.** Removal of Solicitors and Assistant Solicitors. A solicitor or assistant solicitor may be suspended or removed from office, and reinstated, for the same causes and under the same procedures as are applicable to removal of a district court judge.

**Sec. 7A-67.** Effective Date. Except as otherwise provided in Sec. 7A-60, this article shall become effective January 1, 1971."

**Sec. 2.** G.S. 7-44 is hereby rewritten to read as follows:

"G.S. 7-44. Solicitors; Compensation. Effective July 1, 1967, solicitors shall receive, as full compensation for their services as solicitors, thirteen thousand dollars ($13,000.00) per year, except that solicitors who qualify July 1, 1968 as full-time solicitors under G.S. 7-45(b), shall receive fifteen thousand dollars ($15,000.00) per year. The salaries set forth in this Section shall be in lieu of fees or other compensation, except the expenses allowed in G.S. 7-45."

**Sec. 3.** Effective July 1, 1967, G.S. 7-45 is rewritten to read as follows:

"G.S. 7-45. Travel and Office Expenses of Solicitors. (a) In

addition to the salary set forth in G.S. 7044, each solicitor shall receive the sum of three thousand dollars ($3,000.00) per year, as reimbursement for all of his travel and subsistence expenses while engaged in duties connected with his office. This sum shall be paid in equal monthly installments out of the State treasury upon warrants duly drawn thereon.

(b) Solicitors in the following districts may elect to become full-time State employees on July 1, 1968, provided they discontinue the private practice of law and so certify to the Administrative Officer of the Courts by that date: the second, the third, the fourth, the fifth, the sixth, the seventh, the eighth, the ninth, the tenth, ten-A, the eleventh, the twelfth, the thirteenth, fourteen-A, the fifteenth, the sixteenth, the eighteenth, and the nineteenth. Solicitors who qualify under this subsection are entitled to a State allowance of not to exceed four hundred dollars ($400.00) per month per solicitor, to be used to reimburse the solicitor for actual expenditures for office rent, secretarial service, telephone bills, postage, and similar expenses of his office. Reimbursement shall be in accordance with regulations issued by the Administrative Office of the Courts."

**Sec. 4.** G.S. 7A-160 is amended by rewriting the first sentence thereof to read as follows: "The senior resident superior court judge shall appoint, for a term of four years, a district court prosecutor for his district, except that the term of office of a prosecutor appointed in a district activated in December, 1968, or December, 1970, is terminated December 31, 1970."

**Sec. 5.** Amendments Effective January 1, 1971. Effective January 1, 1971:

(1) G.S. 7A-132 is amended by changing the word "prosecutors" at two places in the caption to "solicitors," by changing the word "prosecutor" at the end of the first sentence to "solicitor," and by changing the word "prosecutors" at the end of the third sentence to "solicitors";

(2) G.S. 7A-133 is amended in the caption and in the first sentence by changing the word "prosecutors" to "solicitors," and in the heading of the chart by changing the words "Asst. Pros.," to "Asst. Solicitors";

(3) G.S. 7A-300(a)(4) is amended by deleting the words "prosecutors, assistant prosecutors, acting prosecutors,";

(4) G.S. 7A-304(a)(2) is amended by deleting the word "prosecutors" in line 10;

(5) G.S. 7A-343(2) is amended by deleting the word "prosecutors"; and

(6) G.S. 7A-345 is amended by deleting the word "prosecutors."

**Sec. 6.** Statutes Repealed. G.S. 7-44 (as rewritten herein), 7-45 (as amended herein), 7-68(b), 7A-43.1, 7A-43.2, 7A-43.3, 7A-160 through 7A-165 (Article 15), and all other laws and clauses of laws in conflict with this Act, are repealed effective January 1, 1971.

**Sec. 7.** Partial Invalidity. If any provision of this Act, or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

**Sec. 8.** Except as otherwise provided in this Act, this Act shall become effective upon its ratification.

In the General Assembly read three times and ratified, this the 3rd day of July, 1967.

## Attachment B

February 18, 1971

Honorable John N. Mitchell
United States Attorney General
Justice Department
Washington, D.C.

Re: Submission of Election Laws;
State of North Carolina;
effected by 1969 General Assembly

Dear Mr. Mitchell:

Pursuant to the provisions of Section 5 of the Voting Rights Act of 1965 (Public Law 89-110), as amended in 1970, we submit the following documents relating to Chapter 163 of the General Statutes of North Carolina as the same was amended by Acts passed during the 1969 Session of the North Carolina General Assembly:

1. Chapter 24 —SL 1969
2. Chapter 44 —SL 1969
3. Chapter 171 —SL 1969
4. Chapter 175 —SL 1969
5. Chapter 208 —SL 1969
6. Chapter 408 —SL 1969
7. Chapter 570 —SL 1969
8. Chapter 750 —SL 1969
9. Chapter 917 —SL 1969
10. Chapter 949 —SL 1969
11. Chapter 971 —SL 1969
12. Chapter 1190—SL 1969
13. Chapter 1280—SL 1969
14. 1970-1971 Election Laws

Very truly yours,

Alex K. Brock
Executive Secretary

## CERTIFICATE OF SERVICE

The undersigned certifies that he has served the foregoing Statement together with copies of the Acts and Amendments listed, along with copies of the 1963 Election Laws, the 1966 Election Laws, the 1967-1968 Election Laws, the 1970-1971 Election Laws of the State of North Carolina and the Report of the Election Laws Revision Commission to the General Assembly of 1967, on the Honorable John N. Mitchell, U.S. Attorney General, Justice Department, Washington, D.C., by depositing same in the U.S. Mail, Registered Mail with Return Receipt Requested, postage prepaid.

This 18th day of February, 1971.

_____

Executive Secretary,
N.C. State Board of Elections

ATTEST:

_____

Notary Public

H.B. 1221 **CHAPTER 1190**

AN ACT TO EXTEND THE DISTRICT COURT SYSTEM TO SEVENTEEN ADDITIONAL COUNTIES, TO MAKE CERTAIN ADDITIONS AND REVISIONS TO GENERAL STATUTES CHAPTER 7A ("THE JUDICIAL DEPARTMENT"), TO REPEAL, REVISE, OR TRANSFER VARIOUS SECTIONS OF GENERAL STATUTES CHAPTER 7 ("COURTS"), AND FOR OTHER RELATED PURPOSES.

*The General Assembly of North Carolina do enact:*

**Section 1.** G.S. 7A-6(a) is amended by deleting from the first sentence the words "a reporter" and inserting in lieu thereof the words "one or more reporters"; by deleting from the second and third sentences the word "reporter" and inserting in lieu thereof the word "reporters"; and by deleting the last sentence. G.S. &A-6(c) is amended by inserting after the word "clerk" in line four the words "each district court prosecutor,".

**Sec. 2.** G.S. 7A-11 is amended by inserting at the end of subsection (a) a sentence to read as follows: "Before entering upon the duties of his office, the clerk shall take the oath of office prescribed by law.", and by deleting subsection (b).

**Sec. 3.** G.S. 7A-16 is amended by rewriting the last sentence of the first paragraph to read as follows: "Before entering upon the duties of his office, a judge of the Court of Appeals shall take the oath of office prescribed for a judge of the General Court of Justice."

**Sec. 4.** G.S. 7A-42 is renumbered G.S. 7A-40, and the following new section is inserted immediately thereafter:

"G.S. 7A-41. *Superior Court Divisions and Districts; judges; assistant solicitors.* The counties of the state are organized into four judicial divisions and 30 judicial districts, and each district has the counties, the number of regular resident superior court judges, and the number of full-time assistant solicitors set forth in the following table:

| Judicial Division | Judicial District | Counties | No. of Resident Judges | No. of Full-time Asst. Solicitors |
|---|---|---|---|---|
| First | 1 | Camden, Chowan, Currituck, Dare, Gates, Pasquotank, Perquimans | 1 | 1 |
| | 2 | Beaufort, Hyde, Martin, Tyrrell, Washington | 1 | 1 |

| | | | | |
|---|---|---|---|---|
| | 3 | Carteret, Craven, Pamlico, Pitt | 1 | 2 |
| | 4 | Duplin, Jones, Onslow, Sampson | 1 | 2 |
| | 5 | New Hanover, Pender | 1 | 2 |
| | 6 | Bertie, Halifax, Hertford, Northampton | 1 | 1 |
| | 7 | Edgecombe, Nash, Wilson | 1 | 2 |
| | 8 | Greene, Lenoir, Wayne | 1 | 2 |
| Second | 9 | Franklin, Granville, Person Vance, Warren | 1 | 1 |
| | 10 | Wake | 2 | 4 |
| | 11 | Harnett, Johnston, Lee | 1 | 2 |
| | 12 | Cumberland, Hoke | 2 | 4 |
| | 13 | Bladen, Brunswick, Columbus | 1 | 1 |
| | 14 | Durham | 1 | 2 |
| | 15 | Alamance, Chatham, Orange | 1 | 3 |
| | 16 | Robeson, Scotland | 1 | 2 |
| Third | 17 | Caswell, Rockingham, Stokes, Surry | 1 | 2 |
| | 18 | Guilford | 3 | 5 |
| | 19 | Cabarrus, Montgomery, Randolph, Rowan | 2 | 3 |
| | 20 | Anson, Moore, Richmond, Stanly, Union | 1 | 2 |
| | 21 | Forsyth | 2 | 4 |
| | 22 | Alexander, Davidson, Davie, Iredell | 1 | 2 |
| | 23 | Alleghany, Ashe, Wilkes, Yadkin | 1 | 1 |
| Fourth | 24 | Avery, Madison, Mitchell, Watauga, Yancey | 1 | 1 |
| | 25 | Burke, Caldwell, Catawba | 1 | 3 |
| | 26 | Mecklenburg | 3 | 6 |
| | 27 | Cleveland, Gaston, Lincoln | 2 | 5 |
| | 28 | Buncombe | 2 | 2 |
| | 29 | Henderson, McDowell, Polk, Rutherford, Transylvania | 1 | 2 |
| | 30 | Cherokee, Clay, Graham, Haywood, Jackson, Macon, Swain | 1 | 1 |

In a district having more than one regular resident judge, the judge who has the most continuous service on the superior court is the senior regular resident superior court judge. If two judges are of equal seniority, the oldest judge is the senior regular resident judge. In a single judge district, the single judge is the senior regular resident judge.

Senior regular resident judges and regular resident judges possess equal judicial jurisdiction, power, authority and status, but all duties placed by the Constitution or statutes on the resident judge of a judicial district, including the appointment to and removal from office, which are not related to a case, controversy, or judicial proceeding and which do not involve the exercise of judicial power, shall be discharged by the senior regular resident judge. A senior regular resident superior court judge in a multi-judge district, by notice in writing to the Administrative Officer of the Courts, may decline to exercise the authority vested in him by this Section, in which event such authority shall be exercised by the regular resident judge next senior in point of service or age, respectively.

Full-time assistant solicitors are not authorized under this Section until January 1, 1971."

**Sec. 5.** G.S. 7A-61 is amended by inserting after the first sentence the following: "Effective January 1, 1971, the solicitor shall also represent the State in juvenile cases in which the juvenile is represented by an attorney."

**Sec. 6.** G.S. 7A-63 is amended by deleting "G.S. 7A-133" in line two, and inserting in lieu thereof "this subchapter."

**Sec. 7.** G.S. 7A-95 is amended by the insertion of the following sentence at the end of subparagraph (c): "If stenotype, shorthand, or stenomask equipment is used, the original tapes, notes, discs or other records are the property of the State, and the clerk shall keep them in his custody."

**Sec. 8.** G.S. 7A-102.1 is amended by inserting in line two of subsection (a), after the word "State", a comma and the words "secretaries to superior court judges and solicitors," and by deleting from the first sentence of subsection (b) the words "office of the clerk of the superior court" and inserting in lieu thereof the words "Judicial Department".

**Sec. 9.** G.S. 7A-103 is amended by deleting from the first first sentence the words "and the Department of Administration."

**Sec. 10.** G.S. 7A-133 is amended as follows:

(a) In the first sentence delete the words "and full-time assistant prosecutors" and in the table heading delete the words "Full-Time Assistant Prosecutors" and the numbers under this heading, effective January 1, 1971;

(b) In the table, increase "3" to "4" the number of judges to which the 25th Judicial District is entitled, effective the first Monday in December, 1966; increase from "6" to "7" the number of judges to which the 18th and 26th judicial districts are entitled, effective the first Monday in December, 1968; increase from "3" to "4" the number of full-time assistant prosecutors to which the 18th and 26th judicial districts are entitled; and increase from "0" to "1" the number of full-time assistant prosecutors to which the 14th judicial district is entitled;

(c) In the table, delete the present minimum and maximum quotas of magistrates for Stanly, Anson, Richmond, Moore, Duplin, Beaufort, Onslow, Pitt, Johnston, Harnett, and Guilford counties, and insert the following quotas in lieu thereof:

| | | |
|---|---|---|
| "Duplin | 9 | 10 |
| Stanly | 5 | 6 |
| Anson | 4 | 5 |
| Richmond | 5 | 6 |
| Moore | 5 | 6 |
| Beaufort | 4 | 5 |
| Onslow | 8 | 10 |
| Pitt | 9 | 11 |
| Johnston | 10 | 12 |
| Harnett | 7 | 9 |
| Guilford | 17 | 22." |

(d) In the table increase from "1" to "2" the number of full-time assistant prosecutors for the 27th Judicial District;

(e) In the table, insert consecutively by judicial district numbers, the following allowances of judges and magistrates, and additional seats of court:

| "District | Judges | County | Magistrates Min.-Max. | Add. Seats of Court |
|---|---|---|---|---|
| 17 | 4 | Caswell | 2-3 | |
| | | Rockingham | 4-8 | Reidsville<br>Eden<br>Madison |
| | | Stokes | 2-3 | |
| | | Surry | 4-6 | Mt. Airy |
| 19 | 5 | Cabarrus | 4-7 | Kannapolis |
| | | Montgomery | 2-3 | |
| | | Randolph | 4-6 | |
| | | Rowan | 4-8 | |
| 22 | 4 | Alexander | 2-3 | |
| | | Davidson | 5-7 | Thomasville |
| | | Davie | 2-3 | |
| | | Iredell | 4-6 | Mooresville |
| 23 | 2 | Alleghany | 1-2 | |
| | | Ashe | 2-3 | |
| | | Wilkes | 4-6 | |
| | | Yadkin | 2-3 | |
| 28 | 4 | Buncombe | 6-10 | |

(f) Session Laws of 1967, Chapter 1049, Section 5(2), which would have amended this Section effective January 1, 1971, is repealed.

**Sec. 11.** G.S. 7A-140 is amended by rewriting the last paragraph to read as follows:

"Before entering upon his duties, each district judge, in addition to other oaths prescribed by law, shall take the oath of office prescribed for a judge of the General Court of Justice."

**Sec. 12.** G.S. 7A-160 is amended in line ten by inserting after the fourth sentence the following: "The prosecutor shall also represent the State in juvenile cases in which the juvenile is represented by an attorney."

**Sec. 13.** G.S. 7A-170 is amended by rewriting the second sentence to read as follows: "Before entering upon the duties of his office, a magistrate shall take the oath of office prescribed for a magistrate of the General Court of Justice."

**Sec. 14.** G.S. 7A-180 is amended by rewriting subparagraph

"(c)" to read as follows: "(3) Immediately sets up and thereafter maintains, under the supervision of the Administrative Office of the Courts, an office of uniform consolidated records of all judicial proceedings in the superior court division and the district court division of the General Court of Justice in his county. Those records shall include civil actions, special proceedings, estates, criminal actions, juvenile actions, minutes of the court and all other records required by law to be maintained. The form and procedure for filing, docketing, indexing, and recording shall be as prescribed by the Administrative Officer of the Courts notwithstanding any contrary statutory provision as to the title and form of the record or as a method of indexing."; and by deleting subparagraph (4) and renumbering subparagraphs (5), (6), (7), and (8) as subparagraphs (4), (5), (6) and (7), respectively.

**Sec. 15.** G.S. 7A-182 is amended by inserting at the end of subsection (b) the following sentence: "An assistant or deputy clerk assigned to a seat of district court described in this subsection shall have the same powers and authority as if he were acting in his own county."

**Sec. 16.** G.S. 7A-192 is amended by deleting the period at the end of the second sentence and inserting in lieu thereof a comma and the words "including causes transferred from the superior court to the district court under the provisions of this chapter."

**Sec. 17.** G.S. 7A-193 is amended by deleting "Chapter 1" in lines two and four, and inserting in lieu thereof "Chapters 1 and 1A".

**Sec. 18.** G.S. 7A-198 is amended by the insertion of the following sentence at the end of subparagraph (c): "If stenotype, shorthand, or stenomask equipment is used, the original tapes, notes, discs, or other records are the property of the state, and the clerk shall keep them in his custody."

**Sec. 19.** G.S. 7A-213 is amended by rewriting the fifth sentence to read as follows: "After service of the magistrate summons on the defendant, the clerk gives written notice of the assignment to the plaintiff."

**Sec. 20.** G.S. 7A-217 is amended by adding the following

subparagraph at the end thereof: "(4) In summary ejectment cases only, service as provided in G.S. 42-29 is also authorized."

**Sec. 21.** G.S. 7A-224 is amended by rewriting the second and third sentences thereof to read as follows: "The judgment so rendered is a judgment of the district court, and is recorded and indexed as are judgments of the district and superior court generally."

**Sec. 22.** G.S. 7A-228 is amended by rewriting the third sentence to read as follows: "Appeal is perfected by serving written notice thereof on all other parties and by filing written notice with the clerk of superior court within 10 days after rendition of judgment."

**Sec. 22 1/2.** G.S. 7A-258(a) is amended by adding a sentence thereto, to read as follows: "A motion to transfer to another division may also be made if all parties to the action or proceeding consent thereto, and if the judge deems the transfer will facilitate the efficient administration of justice."

**Sec. 23.** G.S. 7A-271(a) is amended by deleting the word "or" at the end of subparagraph (3), changing the period at the end of subparagraph (4) to a semicolon, inserting the word "or", and adding a new subparagraph, to read as follows:

"(5) When a misdemeanor conviction is appealed to the superior court for trial de novo, to accept a guilty plea to a lesser-included or related charge".

**Sec. 24.** G.S. 7A-271 is amended by renumbering subsection (b) as subsection (c), and inserting a new subsection (b), to read as follows:

"(b) The jurisdiction of the superior court over misdemeanors appealed from the district court to the superior court for trial do novo is the same as the district court had in the first instance."

**Sec. 25.** G.S. 7A-273 is amended by deleting from subparagraph (5) the words "peace and".

**Sec. 26.** G.S. 7A-288 is amended by inserting the words "in writing" in line three, in the second sentence, after the word "clerk", and by deleting the fourth sentence, which reads: "An appeal may be withdrawn within 20 days after notice of appeal

is given, or 10 days before the next criminal session of superior court convenes, whichever is later."

**Sec. 27.** G.S. 7A-291 is amended in subparagraph (5) by inserting the words "peace and" after the words "State, and".

**Sec. 28.** G.S. 7A-304(a) is amended in subparagraph (1) by inserting the words "and subpoenas" after the words "including citations".

**Sec. 29.** G.S. 7A-304(b) is amended by deleting the following words from lines three through seven: "if an appeal from the district court to the superior court is withdrawn within 20 days after notice of appeal is given, or 10 days before the next criminal session of superior court convenes, whichever is later, only the district court costs shall be assessed, and further,"

**Sec. 30.** G.S. 7A-307(b) is rewritten to read as follows: "(b) The facilities fee and eight dollars ($8.00) of the General Court of Justice fee shall be paid at the time of filing of the first inventory. If the sole asset of the estate is a cause of action, the ten dollars ($10.00) shall be paid at the time of the qualification of the fiduciary."

**Sec. 31.** G.S. 7A-308(a) is amended in subparagraph (12) by changing the fee for preparation of copies from "1.00" to ".50", and by rewriting subparagraph (8) to read as follows: "(8) Taking an acknowledgment or administering an oath, or both, with or without seal, each certificate (except that oaths of office shall be administered to public officials without charge) 1.00."

**Sec. 31 1/2.** G.S. 7A-311(a) is amended by inserting "by the sheriff" after "sales" in line one of subparagraph (3), by deleting subparagraph (5), and by renumbering subparagraph (6) as subparagraph (5).

**Sec. 32.** G.S. 7A-312 is amended by rewriting the first sentence to read as follows: "A juror in the General Court of Justice, including a coroner's juror, but excluding a juror in a special proceeding, shall receive eight dollars ($8.00) per day.", and by deleting the words "in lieu of daily mileage" in the second sentence.

**Sec. 33.** G.S. 7A-313 is amended in line three by deleting "two dollars ($2.00)" and inserting in lieu thereof "three dollars ($3.00)".

**Sec. 34.** G.S. 7A-314 is amended by changing the period at the end of the second sentence to a comma, and adding "except that a witness required to remain overnight at the site of the trial shall be furnished subsistence in lieu of daily mileage."

**Sec. 34 1/2.** G.S. 7A, Article 28, is amended by inserting a new Section to read as follows:

"G.S. 7A-317.1. *Disposition of fees in counties with unincorporated seats of court.* Notwithstanding any other provision of this Article, if a municipality listed in G.S. 7A-133 as an additional seat of district court is not incorporated, the arrest, facilities, and jail fees which would ordinarily accrue thereto, shall instead accrue to the county in which the unincorporated municipality is located."

**Sec. 35.** G.S. 1-282 is amended by deleting from the last sentence the colon and the words "approved" and a sentence as follows: "If it appears that the case on appeal cannot be served within the time prescribed above, the trial judge may, for good cause and after reasonable notice to the opposing party or counsel, enter an order or successive orders extending the time for service of the case on appeal and of the countercase or exceptions to the case on appeal. The initial order of extension must be entered prior to expiration of the statutory time for service of the case on appeal, and any subsequent order of extension must be entered prior to the expiration of the time allowed by the preceding order, and all additional time or times granted in such order or orders of extension must terminate within sufficient time to enable appellant to docket the record on appeal in accordance with the requirements of the rules of the appellate court."

**Sec. 36.** G.S. 7-42 is revised, renumbered, and transferred to Chapter 7A to read as follows:

"G.S. 7A-44. *Salary and expenses of superior court judge.* A judge of the superior court, regular or special, shall receive the annual salary set forth in the Budget Appropriations Act, and in addition shall be allowed five thousand dollars

($5,000.00) per year, payable monthly, in lieu of necessary travel and subsistence expenses while attending court or transacting official business at a place other than in the county of his residence and in lieu of other professional expenses incurred in the discharge of his official duties. The Administrative Officer of the Courts may also reimburse superior court judges, in addition to the above funds for travel and subsistence, for travel and subsistence expenses incurred outside of the state for professional education."

**Sec. 37.** G.S. 7-44 is amended in line three by inserting after the date "July 1, 1968" the words "or July 1, 1969".

**Sec. 38.** G.S. 7-45(b) is amended by inserting after "July 1, 1968," in line two the words and figures "or July 1, 1969,".

**Sec. 39.** G.S. 7-52 is revised, renumbered, and transferred to Chapter 7A, to read as follows:

G.S. 7A-48. *Jurisdiction of emergency judges.* Emergency superior court judges have the same power and authority in all matters whatsoever, in the courts which they are assigned to hold, that regular judges holding the same courts would have. An emergency judge duly assigned to hold the courts of a county or judicial district has the same powers in the district in open court and in chambers as the resident judge or any judge regularly assigned to hold the courts of the district would have, but his jurisdiction in chambers extends only until the session is adjourned or the session expired by operation of law, whichever is later."

**Sec. 40.** G.S. 7-58 is revised, renumbered, and transferred to Chapter 7A, to read as follows:

"G.S. 7A-49. *Orders returnable to another judge; notice.* When any special or emergency judge makes any matter returnable before him, and thereafter he is called upon by the Chief Justice to hold court elsewhere, he shall order the matter heard before some other judge, setting forth in the order the time and place where it is to be heard, and he shall send copies of the order to the attorneys representing the parties in such matter."

**Sec. 41.** G.S. 7-54, G.S. 7-55, G.S. 7-58, and G.S. 7-60 are rewritten, combined, and transferred to Chapter 7A, to read as follows:

"G.S. 7A-45. *Special judges; appointment; removal; vacancies; authority.* (a) The Governor may appoint eight special superior court judges. A special judge takes the same oath of office and is subject to the same requirements and disabilities as is or may be prescribed by law for regular judges of the superior court, save the requirement of residence in a particular district. Initial appointments made under this Section shall be to terms of office beginning July 1, 1967, and expiring June 30, 171. As the terms expire, the Governor may appoint successors for terms of four years each.

(b) A special judge is subject to removal from office for the same causes and in the same manner as a regular judge of the superior court, and a vacancy occurring in the office of special judge is filled by the Governor by appointment for the unexpired term.

(c) A special judge, in any court in which he is duly appointed to hold, has the same power and authority in all matters whatsoever that a regular judge holding the same court would have. A special judge, duly assigned to hold the court of a particular county, has during the session of court in that county, in open court and in chambers, the same power and authority of a regular judge in all matters whatsoever arising in that judicial district that could properly be heard or determined by a regular judge holding the same session of court.

(d) A special judge is authorized to settle cases on appeal and to make all proper orders in regard thereto after the time for which he was commissioned has expired."

**Sec. 42.** G.S. 7-61.1 is revised, renumbered, and transferred to Chapter 7A, to read as follows:

G.S. 7A-47. *Powers of regular judges holding courts by assignment or exchange.* A regular superior court judge, duly assigned to hold the courts of a county, or holding such courts by exchange, shall have the same powers in the district in open court and in chambers as the resident judge or any judge regularly assigned to hold the courts of the district has, and his

jurisdiction in chambers shall extend until the session is adjourned or the session expired by operation of law, whichever is later."

**Sec. 43.** G.S. 7-62 is revised, renumbered, and transferred to Chapter 7A, to read as follows:

"G.S. 7A-49.1. *Disposition of motions when judge disqualified.* Whenever a judge before whom a motion is made, either in open court or in chambers, disqualifies himself from determining it, he may in his discretion refer the motion for disposition to the resident judge or any judge regularly holding the courts of the district or of any adjoining district, who shall have full power and authority to hear and determine the motion in the same manner as if he were the presiding judge of the district in which the cause arose."

**Sec. 44.** G.S. 7-72 and G.S. 7-73 are revised, combined, and transferred to Chapter 7A, to read as follows:

"G.S. 7A-49.2. *Civil business at criminal sessions; criminal business at civil sessions.* (a) At criminal sessions of court, motions in civil actions may be heard upon due notice, and trials in civil actions may be heard by consent of parties. Motions for confirmation or rejection of referees' reports may also be heard upon ten days notice and judgment may be entered on such reports. The court may also enter consent orders and consent judgments, and try uncontested civil actions and uncontested divorce cases.

(b) For sessions of court designated for the trial of civil cases only, no grand juries shall be drawn and no criminal process shall be made returnable to any civil session."

**Sec. 45.** G.S. 7-73.1 is revised, renumbered, and transferred to Chapter 7A, to read as follows:

"G.S. 7A-49.3. *Calendar for criminal trial sessions.* (a) At least one week before the beginning of any sessions of the superior court for the trial of criminal cases, the solicitor shall file with the clerk of superior court a calendar of the cases he intends to call for trial at that session. The calendar shall fix a day for the trial of each case listed thereon. The solicitor may place on the calendar for the first day of the session all cases which will require consideration by the grand jury without ob-

ligation to call such cases for trial on that day. No case on the calendar may be called for trial before the day fixed by the calendar except by consent or by order of the court. Any case docketed after the calendar has been filed with the clerk may be placed on the calendar at the discretion of the solicitor.

(b) All witnesses shall be subpoenaed to appear on the date listed for the trial of the case in which they are witnesses. Witnesses shall not be entitled to prove their attendance for any day or days prior to the day on which the case in which they are witnesses is set for trial, unless otherwise ordered by the presiding judge.

(c) Nothing in this Section shall be construed to affect the authority of the court in the call of cases for trial."

**Sec. 46.** G.S. 7-78, G.S. 7-80, and G.S. 7-83 are revised, combined, and transferred to Chapter 7A, to read as follows:

"G.S. 7A-46. *Special sessions.* Whenever it appears to the Chief Justice of the Supreme Court that there is need for a special session of superior court in any county, he may order a special session in that county, and order any regular, special, or emergency judge to hold such session. The Chief Justice shall notify the clerk of superior court of the county, who shall initiate action under Chapter 9 of the General Statutes to provide a jury for the special session, if a jury is required.

Special sessions have all the jurisdiction and powers that regular sessions have."

**Sec. 47.** G.S. 7-65 is revised, renumbered, and transferred to Chapter 7A, to read as follows:

"G.S. 7A-47.1. *Jurisdiction in vacation or in session.* In any case in which the superior court in vacation has jurisdiction, and all the parties unite in the proceedings, they may apply for relief to the superior court in vacation, or during a session of court, at their election. The resident judge of the judicial district and any special superior court judge residing in the district and the judge regularly presiding over the courts of the district have concurrent jurisdiction in all matters and proceedings in which the superior court has jurisdiction out of session; Provided, that in all matters and proceedings not requiring a jury or in which a jury is waived, the resident judge of the district

and any special superior court judge residing in the district shall have concurrent jurisdiction with the judge holding the courts of the district and the resident judge and any special superior court judge residing in the district in the exercise of such concurrent jurisdiction may hear and pass upon such matters and proceedings in vacation, out of session or during a session of court."

**Sec. 48.** G.S. 7-70.2 is revised, renumbered, and transferred to Chapter 7A, to read as follows:

"G.S. 7A-42. *Sessions of superior court in cities other than county seats.*

"(a) Sessions of the superior court shall be held in each city in the State which is not a county seat and which has a population of 35,000 or more, according to the 1960 federal census.

(b) For the purpose of segregating the cases to be tried in any city referred to in subsection (a), and to designate the place of trial, the clerk of superior court in any county having one or more such cities shall set up a criminal docket and a civil docket, which dockets shall indicate the cases and proceedings to be tried in each such city in his county. Such dockets shall bear the name of the city in which such sessions of court are to be held, followed by the word 'Division.' Summons in actions to be tried in any such city shall clearly designate the place of trial.

(c) For the purpose of determining the proper place of trial of any action or proceeding, whether civil or criminal, the county in which any city described in subsection (a) is located shall be divided into divisions, and the territory embraced in the division in which each such city is located shall consist of the township in which such city lies and all contiguous townships within such county, such division of the superior court to be known by the name of such city followed by the word "Division." All other townships of any such county shall constitute a division of the suprior court to be known by the name of the county seat followed by the word "Division." All laws, rules, and regulations now or hereafter in force and effect in determining the proper venue as between the superior courts of the several counties of the State shall apply for the purpose of determining the proper place of trial as between such divi-

sions within such county and as between each of such divisions and any other county of the superior court in North Carolina.

(d) The clerk of superior court of any county with an additional seat of superior court may, but shall not be required to, hear matters in any place other than at his office at the county seat.

(e) The grand jury for the several divisions of court of any county in which a city described in subsection (a) is located shall be drawn from the whole county, and may hold hearings and meetings at either the county seat or elsewhere within the county as it may elect, or as it may be directed by the judge holding any session of superior court within such county; provided, however, that in arranging the sessions of the court for the trial of criminal cases for any county in which any such city is located a session of one week or more shall be held at the county seat preceding any session of one week or more to be held in any such city, so as to facilitate the work of the grand jury, and so as to confine its meetings to the county seat as fully as may be practicable. All petit jurors for all sessions of court in the several divisions of such county shall be drawn, as now or hereafter provided by law, from the whole of the county in which any such city is located for all sessions of courts in the several divisions of such county.

(f) Special sessions of court for the trial of either civil or criminal cases in any city described in subsection (a) may be arranged as by law now or hereafter provided for special sessions of the superior court.

(g) All court records of all such divisions of the superior court of any such county shall be kept in the office of the clerk of the superior court at the county seat, but they may be temporarily removed under the direction and supervision of the clerk to any such division or divisions. No judgment or order rendered at any session held in any such city shall become a lien upon or otherwise affect the title to any real estate within such county until it has been docketed in the office of the clerk of the superior court at the county seat as now or may hereafter be provided by law; provided, that nothing herein shall affect the provisions of G.S. 1-233 and the equities therein provided for shall be preserved as to all judgments and orders rendered at any session of the superior court in any such city.

(h) It shall be the duty of the board of county commissioners of the county in which any such city is located to provide a suitable place for holding such sessions of court, and to provide for the payment of the extra expense, if any, of the sheriff and his deputies in attending the sessions of court of any such division, and the expense of keeping, housing and feeding prisoners while awaiting trial."

**Sec. 49.** G.S. 7-76 is renumbered and rewritten to read as follows:

"G.S. 7A-96. *Court adjourned by sheriff when judge not present.* If the judge of a superior court shall not be present to hold any session of court at the time fixed therefor, he may order the sheriff to adjourn the court to any day certain during the session, and on failure to hear from the judge it shall be the duty of the sheriff to adjourn the court from day to day, unless he shall be sooner informed that the judge for any reason cannot hold the session."

**Sec. 49 1/2.** G.S. 9-2 is amended by adding the following paragraph thereto:

"The custodians of the appropriate property tax and election registration records in each county shall cooperate with the jury commission in its duty of compiling the list of jurors required by this Section."

**Sec. 50.** G.S. 11-11 is amended by deleting therefrom the oaths of "Judge of the Supreme Court" and "Judge of the Superior Court" and inserting in lieu thereof the oath of "Justice, Judge, or Magistrate of the General Court of Justice" which shall read as follows:

"I, _____, do solemnly swear (affirm) that I will administer justice without favoritism to anyone or to the State; that I will not knowingly take, directly or indirectly, any fee, gift, gratuity or reward whatsoever, for any matter or thing done by me or to be done by me by virtue of my office, except the salary and allowances by law provided; and that I will faithfully and impartially discharge all the duties of _____ of the _____ Division of the General Court of Justice to the best of my ability and understanding, and consistent with the Constitution and laws of the State; so help me, God."

**Sec. 51.** G.S. 11-11 is amended by rewriting the oath of the Clerk of the Supreme Court to read as follows:

"I, _____, do solemnly swear that I will discharge the duties of the office of Clerk of the Supreme Court without prejudice, affection, favor, or partiality, according to law and to the best of my skill and ability, so help me, God."

**Sec. 51 1/2.** G.S. 15-116 is amended by inserting "and district" after the word "superior" in line two.

**Sec. 52.** G.S. 84-16, as amended by Chapter 44 of Public Laws of 1969, ratified March 7, 1969, is hereby further amended by rewriting subparagraph (1) of paragraph three to read as follows: "(1) All justices, judges, full-time solicitors, and full-time prosecutors of the General Court of Justice who, at the time of their election or appointment, are members in good standing of the North Carolina State Bar;".

**Sec. 53.** G.S. 115-99 is amended by adding the following sentences to the end thereof: "This Section shall not apply in any county in which the district court has been established. This Section is repealed effective January 1, 1971."

**Sec. 54.** G.S. 147-45 is amended as follows:

(a) in the table of paragraph one by deleting the words "Supreme Court Reports" from the heading of the third column and inserting in lieu thereof the words "Appellate Division Reports"; by deleting the number "10" from the third column to the right of the words "Attorney General" and inserting in lieu thereof the number "11"; by deleting the number "7" from the third column to the right of the words "Industrial Commission" and inserting in lieu thereof the number "8"; by inserting the words "Judges of the Court of Appeals" after the words "Justices of the Supreme Court" and inserting "1 each" in the three columns to the right thereof; by inserting the words "Clerk of the Court of Appeals" after the words "Clerk of the Supreme Court" and inserting the number "1" in each of the first two columns and the number "0" in the third column thereafter; by inserting in the second page of the table after the words "State Library" the words "Legislative Building Library" and inserting in the columns to the right thereof the number "2"; by deleting the words "Supreme Court Reporter" and inserting in

lieu thereof the words "Appellate Division Reporter"; by deleting from page three of the table the words "Secretary of War" and inserting in lieu thereof the words "Secretary of Defense"; by deleting the words "Secretary of the Navy" and deleting the numbers from the columns thereafter; by deleting the words "Work Projects Administration" and deleting the numbers from the columns thereafter;

(b) In the text by deleting the words "Supreme Court Reports" from paragraphs one, three, and four and inserting in lieu thereof the words "Appellate Division Reports" wherever the former appears; by rewriting the first sentence of the second paragraph to read as follows: "Each justice of the Supreme Court and judge of the Court of Appeals shall receive for his private use one complete and up-to-date set of the Appellate Division Reports."; and by adding the words "or judge" after the word "justice" in the second sentence of the second paragraph.

**Sec. 55.** G.S. 147-51 is amended by deleting the first paragraph and, in the second paragraph, by deleting the words "Supreme Court Reports" and inserting in lieu thereof the words "Appellate Division Reports".

**Sec. 56.** G.S. 163-106 is amended by inserting in subsection (d) the words "or two or more vacancies for the office of district court judge" after the words "office of superior court judge".

**Sec. 57.** *Laws Repealed.* (a) G.S. 7A-17, 7A-36, 114-10, and 114-11 are repealed.

(b) The following Sections of G.S. Chapter 7 are repealed: 7-40, 7-41, 7-43, 7-46, 7-47, 7-48, 7-49, 7-57, 7-59, 7-61, 7-63, 7-64, 7-66, 7-67, 7-68(a), 7-68.1, 7-68.2, 7-68.3, 7-68.4, 7-68.5, 7-68.6, 7-68.7, 7-68.8, 7-68.9, 7-69, 7-77, 7-81, 7-82, 7-84, 7-85, 7-86, 7-87, 7-88, 7-92.1, 7-92.2, 7-92.3, 7-240, 7-241, 7-242, 7-296.1 through 296.18.

(c) G.S. Chapter 151 (Constables) is repealed effective January 1, 1971.

(d) All other laws and parts of laws in conflict with this Act are also repealed.

**Sec. 58.** *Partial invalidity.* If any provision of this Act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

**Sec. 59.** *Effective Date.* Except as otherwise provided in this Act, this Act shall become effective July 1, 1969.

In the General Assembly read three times and ratified, this the 1st day of July, 1969.

**Attachment C**

# Department of Justice

WASHINGTON

April 20, 1971

Mr. Alex K. Brock
Executive Secretary
North Carolina State
Board of Elections
Suite 801, Raleigh Building
5 West Hargett Street
Raleigh, North Carolina 27601

Dear Mr. Brock:

This is in reference to your submission pursuant to Section 5 of the Voting Rights Act of 1965 of documents relating to Chapter 163 of the General Statutes of North Carolina amended during the 1969 Session of the North Carolina General Assembly.

The Attorney General will not at this time object to the implementation of any of the enactments submitted, except that the Attorney General does object to the implementation of that portion of Chapter 750 (Senate Bill 457) which imposes literacy requirements in connection with voter registration. This provision is contrary to Section 201 of the Voting Rights Act Amendments of 1970. Of course, this objection applies only to that part of the amended version of Section 163-67(a) requiring an applicant for voter registration to make a "written" and "signed" statement.

As you may know, Section 5 of the Voting Rights Act of 1965 offers you the alternative of initiating an action in the United States District Court for the District of Columbia for a declaratory judgment that the provision objected to does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.

Sincerely,

/s/ JERRIS LEONARD
Assistant Attorney General
Civil Rights Division

**Attachment D**

# Department of Justice

WASHINGTON

April 23, 1971

Mr. Alex K. Brock
Executive Secretary
North Carolina
State Board of Elections
Suite 801, Raleigh Building
5 West Hargett Street
Raleigh, North Carolina 27601

Dear Mr. Brock:

This is to confirm your telephone conversation today with Walter Gorman of this Division concerning your submission pursuant to Section 5 of the Voting Rights Act of 1965 of documents relating to Chapter 163 of the General Statutes of North Carolina amended during the 1967 Session of the North Carolina General Assembly.

As Mr. Gorman explained, the Attorney General will not at this time object to the implementation of changes in voting procedure submitted, with the exception of Chapter 1063 which requires candidates in certain multi-member election districts to run for numbered seats in the State Senate and House of Representatives. After examining the submission, we have determined that the information sent to the Attorney General was insufficient to properly evaluate Chapter 1063. Because of this, the submission is not adequate for the Department to fulfill its responsibilities under federal law of determining the purpose and effect of the voting change.

Would you please assist us by providing this Department, as soon as possible, a copy of committee reports on Chapter 1063 and any other documents or statements which reflect the reasons for enacting this statute.

As you know, the Attorney General has a 60-day period to consider enactments submitted pursuant to Section 5. With respect to Chapter 1063, this time will begin to run upon receipt of the additional information we have requested.

Also, I must advise you that there were several statutes submitted, such as the changes in the North Carolina court system, which did not deal with voting practices or procedures and, thus, are not subject to Section 5 of the Voting Rights Act. These amendments to existing laws were not reviewed by this Division, and because Section 5 does not cover an enactment unless it changes in some way the previously existing statute, I have not reviewed those portions of Chapter 163 of the North Carolina Code which were not altered.

Sincerely,

/s/ DAVID L. NORMAN
Acting Assistant Attorney General
Civil Rights Division

**Attachment E**

H.B. 367 **CHAPTER 262**

AN ACT TO AMEND G.S. 163-147 SO AS TO MAKE THE SECTION APPLICABLE TO CANDIDATES FOR THE OFFICE OF SUPERIOR COURT JUDGE IN MULTIPLE JUDGE DISTRICTS.

*The General Assembly of North Carolina do enact:*

**Section 1.** G.S. 163-147 is hereby amended by inserting immediately after the words "North Carolina" and immediately before the word "to" in line three thereof the words: "or two or more vacancies in the office of Superior Court Judge in any judicial district".

**Sec. 2.** All laws and clauses of laws in conflict with this Act are hereby repealed.

**Sec. 3.** This Act shall become effective upon its ratification.

In the General Assembly read three times and ratified, this the 15th day of April, 1965.

**Attachment F**

S.C. 557 **CHAPTER 997**

AN ACT TO PROVIDE FOR ADDITIONAL RESIDENT JUDGES IN THE TWELFTH, EIGHTEENTH, NINETEENTH, TWENTY-SIXTH AND TWENTY-EIGHTH JUDICIAL DISTRICTS.

*The General Assembly of North Carolina do enact:*

**Section 1.** There is hereby created the office of additional resident judge of each of the judicial districts designated as the twelfth, nineteenth and twenty-eighth, effective as of January 1, 1967.

**Sec. 2.** There is hereby created a second additional resident judgeship of the eighteenth and twenty-sixth judicial districts, effective as of January 1, 1967.

**Sec. 3.** The Governor shall appoint an additional resident judge for each of the twelfth, eighteenth, nineteenth, twenty-sixth, and twenty-eighth judicial districts, to take office July 1, 1967. The successors of the Governor's appointees shall be chosen in the manner prescribed by law for other Resident Superior Court Judges in the general election of 1968 to serve for the unexpired portion of the term of eight years which began as of January 1, 1967, and their successors shall be chosen thereafter in the manner and serve for terms as prescribed for other Resident Superior Court Judges.

**Sec. 4.** The present resident judges of the twelfth, nineteenth and twenty-eighth judicial districts shall be the senior resident judges of their respective judges.

**Sec. 5.** The additional resident judges of the twelfth, eighteenth, nineteenth, twenty-sixth, and twenty-eighth judicial districts shall, in respect to the exercise of judicial power, have equal jurisdiction, authority and status with the senior resident judges of such districts; but all duties placed by the Constitution or statutes on the resident judge of a judicial district, including the appointment to and removal from office, which are not related to a case, controversy, or judicial proceeding and which do not involve the exercise of judicial power, shall be discharged by the resident judge of the judicial district senior in

point of continuous service on the Superior Court; and if two judges be of equal seniority, then by the judge who is senior in point of age.

**Sec. 6.** There is hereby appropriated for each year of the biennium 1967-69, one hundred seventeen thousand five hundred dollars ($117,500.00) for the purposes set forth in the preceding Section of this bill.

**Sec. 7.** All laws and clauses of laws in conflict with this Act are hereby repealed.

**Sec. 8.** This Act shall become effective upon its ratification.

In the General Assembly read three times and ratified, this the 29th day of June, 1967.

# APPENDIX G

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

**U.S. Constitution, Fourteenth Amendment:**

AMENDMENT XIV.

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state herein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

§ 3. No person shall be a senator or representative in congress, or elector of president and vice president, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may by a vote of two-thirds of each house remove such disability.

§ 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

§ 5. The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

**U.S. Constitution, Fifteenth Amendment:**

AMENDMENT XV.

§ 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

§ 2. The congress shall have power to enforce this article by appropriate legislation.

42 U.S.C. 1973:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class

elected in numbers equal to their proportion in the population.

42 U.S.C. 1973c:

Whenever a State or political subdivision with respect to which the prohibition set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibition set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualifications, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after

such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure, In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

**Chapter 262, (North Carolina) Session Laws of 1965:**

H. B. 367 **CHAPTER 262**

AN ACT TO AMEND G. S. 163-147 SO AS TO MAKE THE SECTION APPLICABLE TO CANDIDATES FOR THE OFFICE OF SUPERIOR COURT JUDGE IN MULTIPLE JUDGE DISTRICTS.

*The General Assembly of North Carolina do enact:*

**Section 1.** G. S. 163-147 is hereby amended by inserting immediately after the words "North Carolina" and immediately before the word "to" in line three thereof the words: "or two or more vacancies in the office of Superior Court Judge in any judicial district".

**Sec. 2.** All laws and clauses of laws in conflict with this Act are hereby repealed.

**Sec. 3.** This Act shall become effective upon its ratification.

In the General Assembly read three times and ratified, this the 15th day of April, 1965.

**Chapter 997, (North Carolina) Session Laws of 1967:**

S. B. 557 **CHAPTER 997**

AN ACT TO PROVIDE FOR ADDITIONAL RESIDENT JUDGES IN THE TWELFTH, EIGHTEENTH, NINETEENTH, TWENTY-SIXTH AND TWENTY-EIGHTH JUDICIAL DISTRICTS.

*The General Assembly of North Carolina do enact:*

**Section 1.** There is hereby created the office of additional resident judge of each of the judicial districts designated as the twelfth, nineteenth and twenty-eight, effective as of January 1, 1967.

**Sec. 2.** There is hereby created a second additional resident judgeship of the eighteenth and twenty-sixth judicial districts, effective as of January 1, 1967.

**Sec. 3.** The Governor shall appoint an additional resident judge for each of the twelfth, eighteenth, nineteenth, twenty-sixth, and twenty-eight judicial districts, to take office July 1, 1967. The successors of the Governor's appointees shall be chosen in the manner prescribed by law for other Resident Superior Court Judges in the general election of 1968 to serve for the unexpired portion of the term of eight years which began as of January 1, 1967, and their successors shall be chosen thereafter in the manner and serve for terms as prescribed for other Resident Superior Court Judges.

**Sec. 4.** The present resident judges of the twelfth, nineteenth and twenty-eight judicial districts shall be the senior resident judges of their respective districts.

**Sec. 5.** The additional resident judges of the twelfth, eighteenth, nineteenth, twenty-sixth, and twenty-eighth judicial districts shall, in respect to the exercise of judicial power, have equal jurisdiction, authority and status with the senior resident judges of such districts; but all duties placed by the Constitution or statutes on the resident judge of a judicial district, including the appointment to and removal from office, which are not related to a case, controversy, or judicial proceeding and which do not involve the exercise of judicial power, shall be discharged by the resident judge of the judicial district senior in point of continuous service on the Superior Court; and if two judges be of equal

seniority, then by the judge who is senior in point of age.

**Sec. 6.** There is hereby appropriated for each year of the biennium 1967-69, one hundred seventeen thousand five hundred dollars ($117,500.00) for the purposes set forth in the proceeding Section of this bill.

**Sec. 7.** All laws and clauses of laws in conflict with this Act are hereby repealed.

**Sec. 8.** This Act shall become effective upon its ratification.

In the General Assembly read three times and ratified, this the 29th day of June, 1967.

**Chapter 1119, (North Carolina) Session Laws of 1977:**

S. B. 125 **CHAPTER 1119**

AN ACT TO AMEND G.S. 7A-41 TO AUTHORIZE ADDITIONAL RESIDENT SUPERIOR COURT JUDGES AND ASSISTANT DISTRICT ATTORNEYS IN VARIOUS JUDICIAL DISTRICTS, TO MAKE APPROPRIATIONS THEREFOR AND TO APPROPRIATE FUNDS FOR DEVELOPMENT OF STANDARD JURY CHARGES.

*The General Assembly of North Carolina enacts:*

**Section 1.** G.S. 7A-41 is amended to authorize an additional resident superior court judge in the third, fourth, eighth, tenth, twelfth, fourteenth, nineteenth, twentieth, twenty-second, and twenty-sixth judicial districts, so that the quota of resident superior court judges for these districts in the table in G.S. 7A-41 will read as follows:

| Judicial District | No. of Resident Judges |
|---|---|
| 3 | 2 |
| 4 | 2 |
| 8 | 2 |
| 10 | 4 |
| 12 | 3 |
| 14 | 3 |
| 19 | 3 |
| 20 | 2 |
| 22 | 2 |
| 26 | 5 |

**Sec. 2.** The additional judges authorized in Section 1 of this act shall be appointed by the Governor and shall take office on July 1, 1977. The successors of the Governor's appointees shall be chosen in the manner prescribed by law for other resident superior court judges in the general election of 1978 to serve for the unexpired portion of the term of eight years which began as of January 1, 1977, and their successors shall be chosen thereafter in the manner and serve for terms as prescribed for other resident superior court judges.

**Sec. 3.** G.S. 7A-41 is amended, effective as of July 1, 1977, to increase the number of assistant district attorneys for the third, fourth, fifth, eighth, tenth, twelfth, thirteenth, fourteenth, sixteenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-seciond, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth and twenty-seventh-A, judicial districts, so that the quota of assistant district attorneys for these districts in the table in G.S. 7A-41 will read as follows:

| Judicial District | No. of Full-Time Assistant District Attorneys |
|---|---|
| 3 | 7 |
| 4 | 7 |
| 5 | 6 |
| 8 | 6 |
| 10 | 12 |
| 12 | 9 |
| 13 | 3 |
| 14 | 6 |
| 16 | 5 |
| 18 | 10 |
| 19 | 7 |
| 20 | 7 |
| 21 | 8 |
| 22 | 5 |
| 23 | 2 |
| 24 | 2 |
| 25 | 6 |
| 26 | 15 |
| 27 | 5 for Prosecutorial District 27A and 3 for Prosecutorial District 27B |

**Sec. 4.** G.S. 7A-41 is amended by changing the figure designating the number of resident judges in the fifth judicial district from "1" to "2". This amendment does not authorize an additional resident superior court judge for the fifth judicial district. It changes the table so as to reflect the additional judge provided by Session Laws 1969, Chapter 1171.

**Sec. 5.** There is hereby appropriated from the General Fund to the Judicial Department the sum of ninety-seven thousand forty-six dollars ($97,046) for each fiscal year of the 1977-1979 biennium to provide an assistant district attorney for the following judicial districts: five, twenty-one, twenty-five and twenty-seven-A.

**Sec. 6.** There is appropriated from the General Fund to the Administrative Office of the Courts twenty-two thousand dollars ($22,000) during the fiscal year 1977-78 and twenty-two thoussand dollars ($22,000) during fiscal year 1978-79 to provide for drafting, staffing, and other reasonable expenses of developing updated standard jury charges covering various legal situations which arise in court (pattern jury instructions).

**Sec. 7.** This act shall become effective on July 1, 1977.

In the General Assembly read three times and ratified, this the 1st day of July, 1977.

**Chapter 1130, (North Carolina) Session Laws of 1977:**

S. B. 224 **CHAPTER 1130**

AN ACT TO DIVIDE THE FIFTEENTH AND TWENTY-SEVENTH JUDICIAL DISTRICTS, AND TO CREATE ADDITIONAL DISTRICT ATTORNEYS, SUPERIOR COURT JUDGE, AND DISTRICT COURT JUDGES AS REQUIRED THEREBY AND TO MAKE APPROPRIATIONS THEREFOR.

*The General Assembly of North Carolina enacts:*

**Section 1.** G.S. 7A-41, as set forth in the 1976 Interim Supplement to the General Statutes, is amended in the table, effective July 15, 1977, by deleting the reference to the fifteenth judicial district therein, and inserting in lieu thereof the following:

| "Judicial District | Counties | No. of Resident Judges | No. of full-time Asst. District Attorneys |
|---|---|---|---|
| 15A | Alamance | 1 | 3 |
| 15B | Orange<br>Chatham | 1 | 2" |

**Sec. 2.** G.S. 7A-41, as set forth in the 1976 Interim Supplement to the General Statutes, is amended in the table, effective January 1, 1979, by deleting the reference to the twenty-seventh judicial district therein, and inserting in lieu thereof the following:

| "Judicial District | Counties | No. of Resident Judges | No. of full-time Asst. District Attorneys |
|---|---|---|---|
| 27A | Gaston | 2 | 5 |
| 27B | Cleveland<br>Lincoln | 1 | 3" |

**Sec. 3.** G.S. 7A-60(b), as set forth in the 1975 Cumulative Supplement to Volume 1B of the General Statutes, is amended by adding the following paragraphs at the end thereof:

"Effective July 15, 1977, the fifteenth prosecutorial district is divided into two prosecutorial districts, to be known as Prosecutorial Districts 15A and 15B. District 15A shall consist of Alamance County, and District 15B shall consist of Orange and Chatham Counties. The current district attorney of the fifteenth prosecutorial district shall become the district attorney for Prosecutorial District 15A, and the Governor shall appoint a district attorney for Prosecutorial District 15B. The appointee shall serve until January 1, 1979 and his successor shall be chosen in the general election of November 1978, to serve a four-year term beginning January 1, 1979."

**Sec. 4.** G.S. 7A-133, as set forth in the 1976 Interim Supplement to the General Statutes, is amended in the table, effective July 15, 1977, by deleting the references to the fifteenth district under the columns headed "District", "Judges", and "County", and inserting in lieu thereof:

| "District | Judges | County |
|---|---|---|
| 15A | 3 | Alamance |
| 15B | 2 | Orange<br>Chatham" |

The additional district court judge authorized by this act for district fifteen-A shall be appointed by the Governor to serve until the first Monday in December 1980. The appointee's successor shall be chosen in the general election of November 1980 to serve a four-year term beginning the first Monday in December 1980.

**Sec. 5.** G.S. 7A-133, as set forth in the 1976 Interim Supplement to the General Statutes, is amended in the table, effective January 1, 1979, by deleting the references to the twenty-seventh district under the columns headed "District", "Judges", and "County", and inserting in lieu thereof:

| "District | Judges | County |
|---|---|---|
| 27A | 4 | Gaston |
| 27B | 2 | Cleveland |
| | | Lincoln |

The additional district court judge authorized by this act for district 27B shall be appointed by the Governor to serve until the first Monday in December 1980. The appointee's successor shall be chosen in the general election of November 1980, to serve a four-year term beginning the first Monday in December 1980.

**Sec. 6.** G.S. 7A-465, as set forth, in the 1975 Cumulative Supplement to Volume 1B of the General Statutes, is amended by adding the following at the end of the third paragraph.

"Effective January 1, 1979, the twenty-seventh judicial district is divided into judicial districts 27A and 27B. On that date the current public defender of the twenty-seventh district shall become the public defender for district 27A."

**Sec. 7.** G.S. 7A-466, as set for th in the 1975 Cumulative Supplement to Volume 1B of the General Statutes, is amended in line 2 by deleting "twenty-sixth and twenty-seventh" and inserting in lieu thereof "twenty-sixth and twenty-seventh-A".

**Sec. 8.** There is hereby appropriated from the General Fund to the Judicial Department the sum of forty-one thousand six hundred ninety-five dollars ($41,695) for the 1977-1978 fiscal year and the sum of ninety-seven thousand five hundred seventy-seven dollars ($97,577) to provide additional judicial employees in judicial districts fifteen-A, fifteen-B, twenty-seven-A and twenty-seven-B.

**Sec. 9.** This act shall become effective July 15, 1977.

In the General Assembly read three times and ratified, this the 1st day of July, 1977.

**Chapter 1238, (North Carolina) Session Laws of 1977:**

S. B. 996 **CHAPTER 1238**

AN ACT TO DIVIDE THE NINETEENTH JUDICIAL DISTRICT, AND TO CREATE AN ADDITIONAL DISTRICT ATTORNEY AND DISTRICT COURT JUDGE AS REQUIRED THEREBY AND TO MAKE APPROPRIATIONS THEREFOR.

*The General Assembly of North Carolina enacts:*

**Section 1.** G.S. 7A-41 is amended in the Table, effective January 1, 1979, by deleting the reference to the Nineteenth Judicial District therein, and inserting in lieu thereof the following:

| "Judicial District | Counties | No. of Resident Judges | No. of Full-Time Asst. District Attorneys |
|---|---|---|---|
| 19A | Cabarrus, Rowan | 2 | 4 |
| 19B | Montgomery, Randolph | 1 | 3" |

**Sec. 2.** G.S. 7A-60(b) is amended by adding the following paragraph at the end:

"Effective January 1, 1979, the Nineteenth Prosecutorial District is divided into two Prosecutorial Districts, to be known as Prosecutorial Districts 19A and 19B. District 19A shall consist of Cabarrus and Rowan Counties, and District 19B shall consist of Montgomery and Randolph Counties. The current District Attorney for Prosecutorial District 19A, and the Governor shall appoint a District Attorney for Prosecutorial District 19B. The appointee shall serve until January 1, 1981, and his successor shall be chosen in the general election of November 1980, to serve a four-year term beginning January 1, 1981."

**Sec. 3.** G.S. 7A-133 is amended in the Table, effective January 1, 1979, by deleting the references to the Nineteenth District under the columns headed "District", "Judges", and "County", and inserting in lieu thereof:

| "District | Judges | County |
|---|---|---|
| 19A | 4 | Cabarrus |
| | | Rowan |
| 19B | 2 | Montgomery |
| | | Randolph" |

**Sec. 4.** The additional district court judge authorized by this

act for District 19B shall be appointed by the Governor to serve until the first Monday in December 1980. The appointee's successor shall be chosen in the general election of November 1980 to serve a four-year term beginning the first Monday in December 1980.

**Sec. 4.** There is hereby appropriated from the General Fund to the Judicial Department the sum of eighty-three thousand four hundred ten dollars ($83,410) for the 1978-79 fiscal year to provide additional judicial employees in judicial District 19B.

**Sec. 5.** This act shall become effective July 1, 1978.

In the General Assembly read three times and ratified, this the 16th day of June, 1978.

**Chapter 1109, (North Carolina) Session Laws of 1983:**

H. B. 155! **CHAPTER 1109**

AN ACT TO APPROPRIATE FUNDS TO THE JUDICIAL DEPARTMENT AND THE ADMINISTRATIVE OFFICE OF THE COURTS.

*The General Assembly of North Carolina enacts:*

**Section 1.** There is appropriated from the General Fund to the Judicial Department the sum of eighty-five thousand dollars ($85,000) for fiscal year 1984-85 to continue the Mecklenburg County pilot program requiring mediation of disputes over child custody and visitation.

**Sec. 2.** There is appropriated from the General Fund to the Judicial Department for fiscal year 1984-85 the following amounts for salaries and benefits for the following new positions:

| | | |
|---|---|---|
| (a) | Four superior court judges added by Section 4 of this act | $209,804 |
| (b) | Four court reporters added by Section 7 of this act | $ 55,168 |
| (c) | Four district court judges added by Section 5 of this act | $256,812 |

| | | |
|---|---|---|
| (d) | Seven magistrates added by Section 8 of this act | $105,434 |
| (e) | Four assistant district attorneys added by Section 4.1 of this act | $154,076 |
| (f) | 53 deputy clerks of superior court added by Section 6 of this act | $765,645 |

**Sec. 2.1.** There is appropriated from the General Fund to the Judicial Department for fiscal year 1984-85 the sum of seventy-two thousand dollars ($72,000) for the increase in expense allowance provided by Section 2.2 of this act.

**Sec. 2.2.** G.S. 7A-44(a) is amended by deleting "five thousand five hundred dollars ($5,500)", and inserting in lieu thereof "six thousand five hundred dollars ($6,500)".

**Sec. 3.** There is appropriated from the General Fund to the Administrative Office of the Courts for fiscal year 1984-85 the following amounts for the following purposes:

| | | |
|---|---|---|
| (a) | Equipment for clerk of court accounting system to upgrade program | $ 600,000 |
| (b) | Expansion of court information system (mainframe, peripherals, and software) | $1,700,000 |
| (c) | Update filing systems in offices of clerks of court | $ 153,785 |
| (d) | Fund clerical positions until June 30, 1985, for indigency screening program under Section 7 of 1983 Session Laws Chapter 881 | $ 46,500 |

**Sec. 4.** G.S. 7A-41 is amended in the table so that the total numbers of resident judges for the indicated judicial districts read:

| "Judicial District | No. of Resident Judges |
|---|---|
| 1 | 2 |
| 9 | 2 |
| 18 | 4 |
| 30 | 2." |

**Sec. 4.1.** G.S. 7A-41 is amended in the table so that the total numbers of full-time assistant district attorneys for the indicated judicial districts read:

| "Judicial District | No. of Full-Time Asst. District Attorneys |
|---|---|
| 2 | 4 |
| 12 | 12 |
| 17B | 3 |
| 18 | 14." |

**Sec. 5.** G.S. 7A-133 is amended in the table so that the numbers of district court judges for the indicated judicial districts read:

| "District | Judges |
|---|---|
| 2 | 3 |
| 12 | 6 |
| 21 | 6 |
| 26 | 11." |

**Section 6.** There are established 53 new positions of deputy clerk of superior court, to be allocated among the State's counties by the Administrative Officer of the Courts pursuant to the formula developed under Section 9 of 1983 Session Laws Chapter 881.

**Sec. 7.** There are established four new positions of court reporter, to be appointed in accordance with the provisions of G.S. 7A-95(e).

**Sec. 8.** There are established seven new positions of magistrate, to be appointed in accordance with the provisions of G.S. 7A-171.

**Sec. 9.** Article 12 of General Statutes Chapter 7A is amended by adding a new section to read:

"§7A-113. Bookkeeping and accounting systems equipment—Nothwithstanding the provisions of G.S. 147-64.6(10), proposed changes in the kinds of bookkeeping and accounting systems equipment employed by the clerk of superior court shall be subject to review and approval by the Office of State Budget and Management. The Administrative Officer of the Courts shall, prior to implementing any change in the kinds of equipment, file with the Office of State Budget and Management a request for approval of the change, along with supporting information. If within 30 days of the filing of the request the Office of State

Budget and Management has not disapproved the request, the request shall be deemed to be approved."

**Sec. 10.** G.S. 143-2 is amended in the final paragraph by inserting between the word, "in" and the citation, "G.S. 143-25" the following: "G.S. 7A-113 or in".

**Sec. 11.** G.S. 7A-10(c), 7A-18(b), 7A-44(b) and 7A-144(b) are each amended by rewriting the last sentence of those subsections to read:

"'Service' means service as a justice or judge of the General Court of Justice or as a member of the Utilities Commission."

**Sec. 12.** G.S. 7A-455(b) is rewritten to read:

"(b) In all cases the court shall fix the money value of services rendered by assigned counsel or the public defender, and such sum plus any sums allowed by the court for other necessary expenses of representing the indigent person, shall be entered as a judgment in the office of the clerk of superior court, and shall constitute a lien as prescribed by the general law of the State applicable to judgments. Any reimbursement to the State as provided in subsection (a) of this section or any funds collected by reason of such judgment shall be deposited in the State Treasury and credited against the judgment; provided, that counsel fees ordered paid to the clerk on behalf of the appointed counsel pursuant to G.S. 15A-1343(e) may be paid directly to the counsel."

**Sec. 13.** The superior and district court judgeships created by Sections 4 and 5 of this act shall be filled as follows:

(1) Initial appointments to each of the superior court judgeships shall be made by the Governor for a term to expire on December 31, 1986.

(2) Initial appointments to each of the district court judgeships shall be made by the Governor for a term to expire on the first Monday in December 1986.

**Sec. 13.1.** The first sentence of G.S. 7A-10(c), the first sentence of G.S. 7A-18(b), the first sentence of G.S. 7A-44(b), the first sentence of G.S. 7A-144(b), the first sentence of G.S. 7A-65(c), and the first sentence of the last paragraph of G.S. 7A-101 are each amended:

(1) by deleting "and", and inserting in lieu thereof ","; and

(2) by adding immediately before the period the following language: ", fourteen and four-tenths percent (14.4%) after 15

years of service, and nineteen and two-tenths percent (19.2%) after 20 years of service".

**Sec. 13.2.** There is appropriate from the General Fund to the Administrative Office of the Courts the sum of one hundred fifty-nine thousand six hundred ninety-eight dollars ($159,698) to provide nine additional positions as follows:

(1) A Supreme Court Director of Research,

(2) One statistical analyst,

(3) One purchasing agent,

(4) One microfilm clerk,

(5) Five secretarial positions to be allocated by the Director of the Administrative Office of the Courts to Judicial Officials.

**Sec. 13.3.** There is appropriated from the General Fund to the Administrative Office of the Courts for fiscal year 1984-85 the sum of one hundred fifty-six thousand two hundred forty-seven dollars ($156,247) to provide funding for the equalization of the salaries of employees resulting from Personnel Classification and pay studies.

**Sec. 13.4.** There is appropriated from the General Fund to the Administrative Office of the Courts for fiscal year 1984-85 the sum of sixteen thousand dollars ($16,000) as a grant-in-aid to the Buncombe County Dispute Settlement Center.

**Sec. 13.5.** There is appropriated from the General Fund to the Administrative Office of the Courts for fiscal year 1984-85 the sum of three hundred fifty-nine thousand two hundred fifty dollars ($359,250) to fund the longevity provided by Sec. 13.1 of this act.

**Sec. 13.6.** G.S. 7A-39.2(a), as it appears in the 1981 Replacement Volume 1B of the General Statutes, is amended by deleting from the sixth line thereof the words "annual salary" and inserting in lieu thereof the words "total annual compensation, including longevity, but excluding any payments in the nature of reimbursement for expenses,".

**Sec. 13.7.** G.S. 7A-39.2(b), as it appears in the 1981 Replacement Volume 1B of the General Statutes, is amended by deleting from the fourth line thereof the words "annual salary" and inserting in lieu thereof the words "total annual compensation, including longevity, but excluding any payments in the nature of reimbursement for expenses,".

**Sec. 13.8.** G.S. 7A-39.2(b), as it appears in the 1981 Replacement Volume 1B of the General Statues, is amended by deleting from the fifth line thereof the words "annual salary" and inserting in lieu thereof the words "total annual compensation, including longevity, but excluding any payments in the nature of reimbursement for expenses,".

**Sec. 13.9.** G.S. 7A-39.2 is amended by adding thereto a new subsection to read:

"(d) For purposes of this section, the 'occupant or occupants of the office which' the retired judge retired will be deemed to be a judge or justice of the Appellate Division holding the same office and with the same service as the retired judge had immediately prior to retirement."

**Sec. 13.10.** G.S. 7A-51(a), as it appears in the 1981 Replacement Volume 1B of the General Statutes, is amended by deleting from line 6 of that subsection the words "annual salary" and substituting in lieu thereof the words "total annual compensation, including longevity and additional payment for service as senior resident superior court judge, but excluding any payments in the nature of reimbursement for expenses or subsistence allowances,".

**Sec. 13.11.** G.S. 7A-51(b), as it appears in the 1981 Replacement Volume 1B of the General Statutes, is amended by deleting from line 6 of that subsection the words "annual salary" and substituting in lieu thereof the words "total annual compensation, including longevity and additional payment for service as senior resident superior court judge, but excluding any payments in the nature of reimbursement for expenses or subsistence allowances,".

**Sec. 13.12.** G.S. 7A-51(c) is amended by deleting from line 5 of that subsection the words "annual salary" and substituting in lieu thereof the words "total annual compensation, including longevity and additional payment for service as senior resident superior court judge, but excluding any payments in the nature of reimbursement for expenses or subsistence allowances,".

**Sec. 13.13.** G.S. 7A-51, as it appears in the 1981 Replacement Volume 1B of the General Statutes, is amended by adding thereto a new subsection, to read:

"(e) For purposes of this section, the 'occupants of the office from which' the retired judge retired will be deemed to be a superior court judge holding the same office and with the same service as the retired judge had immediately prior to retirement."

**Sec. 13.14.** G.S. 135-58(c), as it appears in the 1981 Replacement Volume 3B of the General Statutes, is amended by deleting from lines 2-3 of that subsection the words "initially payable upon the retirement of any member" and substituting in lieu thereof the words "payable at any time to a retired member".

**Sec. 13.15.** G.S. 135-58, as it appears in the 1981 Replacement Volume 3B of the General Statutes is hereby amended by adding thereto a new subsection, to read:

"(e) Notwithstanding any other provision to the contrary, in no event will the retirement allowance payable at any time to a retired member who was a member of a previous system immediately prior to January 1, 1974, prior to any reduction of such allowance in accordance with G.S. 135-61, be greater than the retirement allowance to which he would have been entitled under the terms of such previous system if this Article had not been enacted or than the retirement allowance to which he would have entitled under this Article if he had not been entitled to benefits under the terms of such previous system, whichever is larger."

**Sec. 13.16.** There is appropriated from the General Fund to the Administrative Office of the Courts the sum of thirty-six thousand dollars ($36,000) to increase the employer's contribution rate to the Uniform Judicial Retirement System by thirty-two one hundreths of a percent (.32%) of covered payroll of members.

**Sec. 14.** This act shall become effective July 1, 1984, except that Sections 4 and 7 shall become effective December 1, 1984.

In the General Assembly read three times and ratified, this the 6th day of July, 1984.

(3)

No. 85-1066

Supreme Court, U.S.
FILED
JAN 13 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

# Supreme Court of the United States

October Term, 1985

JAMES G. MARTIN, et al.,

*Appellants,*

v.

TERRY L. HAITH,

*Appellee.*

## ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

## MOTION TO AFFIRM

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No. 85-1066

In The

# Supreme Court of the United States

October Term, 1985

JAMES G. MARTIN, et al.,

*Appellants,*

v.

TERRY L. HAITH,

*Appellee.*

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA**

## MOTION TO AFFIRM

Appellee moves pursuant to Rule 16 of the Rules of the Supreme Court of the United States that the order and decree of the District Court be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

## STATEMENT OF FACTS

This action was commenced by Appellee Terry L. Haith, a black citizen and registered voter of Guilford County, North Carolina, because several state statutes affecting voting were not precleared under Section 5 of the Voting Rights Act (hereinafter sometimes the "Act"). 42 U.S.C. § 1973(c). Forty of the state's 100 counties are jurisdictions covered under the Act and, hence any changes which affect voting in these counties are subject to the preclearance requirements of the Act. There is no dispute that the legislation in question was not formally precleared.

The North Carolina laws challenged by Mr. Haith in the lower court all affected the election of Superior Court judges in North Carolina. The first law in question was Chapter 262 of the Session Laws of 1965, passed by the North Carolina General Assembly. This law, passed shortly after the passage of the Act, changed the existing law by creating, for the first time in North Carolina, the requirement that judicial candidates in multi-seat districts designate the seat for which they are running. The second law in question was Chapter 997, Session Laws of 1967. This law changed the existing law by creating additional resident Superior Court Judges in certain judicial districts and by staggering the terms for the election of the judges in those districts. The third law in question was Chapter 1119 Session Laws of 1977. This act added judicial seats in several other judicial districts and, again, created staggered terms for those judges. In many instances staggering the terms in an election means that the judges stand for election at a time different from other

judges in their district. The fourth and fifth laws in question are Chapters 1130 and 1238, Session Laws of 1977. These laws abolished certain judicial districts and created new, divided ones, in their place. Finally, in 1983 the General Assembly enacted Chapter 1109 which again added Superior Court Judges and staggered their terms in yet other judicial districts. None of these laws has ever been precleared.

Suit was filed by Mr. Haith in the United States District Court for the Eastern District of North Carolina and was assigned for hearing to a three-judge panel pursuant to 42 U.S.C. § 1973(c) and 28 U.S.C. § 2284. On September 16, 1985, argument was heard by the panel on cross-motions for summary judgment filed by both parties. By Order and Memorandum Opinion dated September 17, 1985, the panel ruled in favor of Mr. Haith and held that the North Carolina Session Laws in question are subject to the preclearance requirements of the Voting Rights Act. Thereafter, a direct appeal was taken to this Court as allowed by law.

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## ARGUMENT

Mr. Haith has moved this Court to affirm the decision of the three-judge panel below on the grounds that the question presented concerning Section 5 of the Voting Rights Act is so unsubstantial as not to warrant further argument. Mr. Haith contends that, as shown hereinafter, the decision of the lower court is clearly correct and there is no need for this Court to reconsider well settled issues pertaining to the Voting Rights Act.

## I. THE NORTH CAROLINA SESSION LAWS AT ISSUE IN THIS CASE ARE SUBJECT TO THE PRECLEARANCE REQUIREMENT OF SECTION 5 OF THE VOTING RIGHTS ACT.

### A. The Preclearance Requirements Of Section 5 Are To Be Applied Broadly.

The appeal of the lower court's decision in this case asks this Court to consider the applicability and scope of § 5 of the Voting Rights Act, 42 U.S.C. § 1973(c). This provision is, of course, part of a broader statutory scheme and to be understood it must be viewed in the context of the entire Act. In particular, the first section, 42 U.S.C. § 1973, contains the general prohibition against discriminatory voting practices and relates to the requirements of § 5. As amended by Congress in 1982, this provision states in pertinent part,

> § 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation
>
> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

The plain language of this provision makes it clear that the Act applies to *all* standards, practices and procedures that affect voting; there is no exemption from the Act's coverage when the voting involved is for the election of any particular type of state official, including judges.

This conclusion is supported by other provisions of the Act. The definition section states,

> (c)(1) The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this subchapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.
>
> 42 U.S.C. § 1973(1).

No qualification to voting is recognized by this provision and no distinction is drawn between different kinds of elections. The only justifiable conclusion based on the words of the statute is, then, that no voting practice or procedure and no type of election was intended to be excluded from coverage by the Act. It is against this background that any issue regarding the application of §5 of the Act should be considered. The preclearance requirement is the initial step by which proposed changes in election laws and practices made by covered jurisdictions are reviewed and evaluated to protect the broad assurances given by the Act.

In voting to extend the Act in 1982, Congress commented on the vital importance of Section 5 preclearance and the need for its extension. See *Voting Rights Act Extension: Report of the Committee on the Judiciary United States Senate on S. 1992,* S. REP. NO. 97-417, 97th Cong., 2nd Sess. (1982). The Committee, in recommending an extension of the preclearance requirement, noted there existed "virtual unanimity among those who

have studied the record that Section 5 preclearance should be extended." *Id.* at 9. The Committee went on to note that "more sophisticated devices that dilute minority voting strength" have arisen as a result of the initial application of the Act and cited its awareness of the devices as justification for the continued and vigorous requirement of preclearance. *Id.* at 10. Significantly, no qualification or limitation on preclearance was ever suggested by the Committee.

In addition to the language of the Act and recent legislative history, the decisions of this Court support the conclusion that the Act requires preclearance of all laws affecting any voting rights. A majority of this Court has consistently held that the Act, including the preclearance required by Section 5, should be broadly construed. A clear statement of this rule is contained in *Allen v. State Board of Elections,* 393 U.S. 544 (1969). The appellants in that case challenged a number of state enactments on the ground they were covered by the Act and hence subject to the preclearance rule. The laws dealt with the election of county supervisors and members of a local board of education, independent candidacy in general elections, and handwritten ballots. The Court held that these laws fell within the scope of the Act and were subject to preclearance. The Court stated:

> We are convinced that in passing the Voting Rights Act, Congress intended that state enactments such as those involved in the instant cases be subject to the § 5 approval requirements.
>
> The legislative history on the whole supports the view that Congress intended to reach any state enact-

> ment which altered the election law of a covered State *in even a minor way.* (Emphasis added).
>
> 393 U.S. at 566.

In the subsequent decisions of this Court concerning the Act, the Court has consistently held that the preclearance requirements are not to be viewed restrictively. Thus, preclearance has been required for laws adopting at-large voting, *United States v. Board of Commissioners of Sheffield, Alabama,* 435 U.S. 110 (1978); *Perkins v. Matthews,* 400 U.S. 379 (1971); to changes in polling locations, *Perkins, supra;* to legislative reapportionment plans, *Georgia v. United States,* 411 U.S. 526 (1973); to a local rule requiring candidates for elective office to take an unpaid leave of absence from work. *Dougherty County, Georgia, Board of Education v. White,* 439 U.S. 32 (1978); and to laws pertaining to annexation, *City of Richmond v. United States,* 422 U.S. 358 (1975).

The North Carolina Session Laws in question fall well within the parameters set out by the facts of these cases and the interpretation of the Act as set out by this Court. From 1965 to 1983 the challenged Sessions Laws established, *inter alia*: a system of numbered seat elections for superior court judges in multi-member districts; new judgeships within existing districts (thus creating "multi-member" districts); staggered terms (the equivalent of numbered seats because they preclude "single-shot" voting by minorities); and entirely new judicial districts. These changes are clearly voting standards, practices and procedures subject to the Act and, hence, must be precleared, unless this Court is prepared to rule, as the State argues, that the Act does not apply to the election of judges.

The three-judge panel below held the Act applies to the election of judges and this Court should affirm that decision.

### B. The Voting Rights Act Should Apply to the Election of Judges.

The State argues in its Jurisdictional Statement that voting for judges is somehow different from voting for other elected officials. It contends that the interests of judicial economy—i.e., the State's desire to "ease congestion in its courts by creating new judgeships" should outweigh the protections afforded by the Act. Appellants' Brief at 4. The State further argues the creation of new judgeships, of numbered or "designated" seats, and staggered terms are "perfectly ordinary governmental decisions" that should not have to be precleared. Appellants' Brief at 4-5. Significantly, however, the State does not argue that if these "perfectly ordinary governmental decisions" were applied to other elected officials, then preclearance would not be necessary. Thus, most of the State's argument is irrelevant to the question presented: does the Voting Rights Act apply to the election of judges?

The State also argues that judges are not representatives in the same sense as, say, legislators or councilmen and are largely confined to interpreting rather than making laws, therefore, judicial elections should not be subject to the Act. This argument ignores the fact that judicial voting laws are still "voting" laws and, therefore, have the same potential for jeopardizing fair voting as any other voting rule or practice. It is naive to believe

that no discrimination or "abridgement" could result from a voting law change simply because the reform deals with judicial elections. The risk of prejudice to voting in judicial elections is the same as in any other type of election.

When the State itself decided that judges in North Carolina should be elected by the people of the state in an at-large election, it announced that it was important for the people of the state to cast their ballots for the candidates of their choice. Having made this decision, it is at best inconsistent to argue the Act does not protect the right of some of these people to cast effective ballots in those elections.

The State's reliance on *Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1972), *aff'd*, 409 U.S. 807 (1972), and other cases is misplaced. These cases concerned constitutional challenges to judicial election laws and do not address the separate and distinct issue of whether the Voting Rights Act applies to such laws.*

In other contexts, courts have recognized the importance of constitutional safeguards as applied to judicial elections. In *Voter Information Project v. City of*

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*It is submitted that if the *Holshouser* case had been decided on the present facts the views of Judge Craven in dissent in that case would have prevailed in the majority opinion. As stated in the dissenting opinion, "I agree with my brothers that judges need not be elected, but if the state chooses to elect them, I think its election scheme must accord to the voters equal protection of the laws." 335 F.Supp. 934. This view succintly states the position of Mr. Haith, acknowledged by the three-judge panel, that a state need not elect its judges but, if it does, then the protections afforded by the Voting Rights Act must be followed.

*Baton Rouge,* 612 F.2d 208 (5th Cir. 1980), a constitutional challenge was raised to an at-large scheme of judicial elections on the ground the scheme created impermissible dilution. The lower court dismissed the complaint and the Fifth Circuit reversed, noting that dilution of voting strength along racial lines was clearly prohibited by the Constitution. The Court rejected appellant's arguments that judicial elections enjoy a special status because of the role of judges and concluded by stating,

> It may well be true that Judges are elected to serve the people, not to represent them. But this fact makes plaintiffs' claims of racial discrimination no less important and no less deserving of constitutional protection.
>
> *Id.* at 212.

The rationale of the *Voter Information Project* case applies equally to this case. The fact that the election laws at issue pertain to judicial elections does not exempt them from the substantive protection of § 2 of the Voting Rights Act or the preclearance requirements of the Act. This Court should recognize this principle by affirming the judgment below and dismissing this appeal.

The interpretation of preclearance offered by the State confuses Section 5 and Section 2 of the Act. Certainly the test for whether a law violates the Act can be met upon a showing that the rule will cause a "denial or abridgement of the right of any citizen of the United States to vote on account of race or color," 42 U.S.C. § 1973(a). The necessity for preclearance is, however, satisfied by a lesser showing. The language of Section 5 allows a preclearance submission to the Attorney Gen-

eral whenever a covered jurisdiction "shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect" on the relevant date. 42 U.S.C. § 1973(c). Clearly the preclearance test is not equivalent to the showing required to invalidate a law on grounds it discriminates against a group of voters or abridges the right to vote. The need for preclearance is, rather, triggered simply by a change in election laws by a subject jurisdiction. See *Allen,* 393 U.S. at 563. For this reason Appellants are mistaken in equating the "abridgement" test with the preclearance rule as they attempt to do.

Section 5 imposes a general and broad requirement that subject jurisdictions submit proposed voting law changes so that the discriminatory effects of the changes can be ascertained. The "abridgement" test is applied to determine if there is a violation under the Act. Obviously, if the proposed law abridges voting rights, it may ultimately be invalidated in a subsequent legal proceeding. This does not mean, however, that a covered jurisdiction can avoid preclearance because it believes the proposed changes are not discriminatory. The Act envisions preclearance as a mandatory first step in enforcement of the law and the Court should recognize no exception to this rule.

## II. THE FACTS OF THIS CASE DO NOT EXCUSE THE FAILURE OF THE STATE TO OBTAIN PRECLEARANCE.

The State suggests that the State's failure to submit the session laws for preclearance is excusable given the "special circumstances" of this case. These circum-

stances are purportedly based on certain communications contained in a letter, dated April 23, 1971, sent by David L. Norman, an Acting Assistant Attorney General in the Civil Rights Division of the Justice Department, to the State. (Appellants' Appendix, Attachment D.) The State argues Mr. Norman's statements were sufficient to support the conclusion that laws concerning judicial elections need not be precleared. The State's argument is not pertinent for two reasons. First, no theory of reliance or equity or estoppel can excuse the omissions of the State in failing to preclear the laws in question.* Second, the letter is insufficient to support the State's argument that the Justice Department clearly commented on the applicability of the Act to voting for judges.

As observed by the three-judge panel, no concept of equity or reliance exists to prevent the application of the Voting Rights Act. See 42 U.S.C. § 1973; 1973(c). (Appellants' Appendix, Attachment B at A-7). Further, when the obligation of a state to avoid discriminatory election practices and procedures is at issue, principles of estoppel have no place. To permit this would recognize a defense to noncompliance which is inconsistent with the law and the intent of Congress in enacting it.

An attempt to circumvent the requirements of the Act on "equitable grounds" was rejected by a lower court

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*The State's position that it relied on the statement of Mr. Norman in not preclearing legislation pertaining to judicial elections is contradicted by its own subsequent actions. Chapters 838 and 855, Session Laws of 1974 and Chapter 964, Session Laws of 1981 added judgeships in certain judicial districts and divided a judicial district. As conceded by the State in argument before the court below, these statutes *were* submitted to the Justice Department for preclearance.

in *Dotson v. City of Indianola,* 514 F.Supp. 397 (N.D. Miss. 1981), *aff'd,* 456 U.S. 1002 (1982). In the *Dotson* case, the defendants presented a laches defense to an injunction action brought for failure to preclear laws creating certain annexations. The three-judge panel expressly held laches was not available as a defense in a private injunction suit brought under the Voting Rights Act. The Court reasoned that to recognize such a defense would defeat the remedial purposes of the act, would be inconsistent with the duty imposed on a covered jurisdiction by Section 5, and would avoid the real issue—i.e., the legality of the annexations. 514 F.Supp. at 401.

The logic of the *Dotson* case applies to this case. For this Court to recognize the State's "special circumstances" defense would defeat the intent and purposes of the Voting Rights Act in the same manner as rejected by the court in the *Dotson* case. The State, if it relied on Mr. Norman's statement, did not do so to its detriment; the State is nothing more than the arm of its people and the people deserve the protection of the Voting Rights Act.

Additionally, the State's reliance on a one sentence passage in Mr. Norman's letter is misplaced. The State contends Mr. Norman's statement stands for the proposition that Section 5 does not apply to judicial elections. However, because of the manner in which the laws were submitted, it is not clear the Attorney General understood that the law to which he was referring concerned a change in the boundaries of an electoral district. The letter only states, "changes in the North Carolina Court system, *which did not deal with voting practices or procedures* . . . are not subject to § 5 of the Voting Rights

Act." (Emphasis added). (Appellants' Appendix, Attachment D). No indication is given as to exactly which statute is being referenced.

The confusion in the Norman letter was due to the method of submission by the State. The statutes in question were simply transmitted to the Attorney General in bulk and without any of the required explanation. (Appellants' Appendix, Attachment B.) See 28 C.F.R. § 51.25 (setting out the required contents for each submission). For this reason, Mr. Norman's remarks cannot be conclusively linked to any particular statute. Therefore, the ambiguity in the Attorney General's statement is directly traceable to the unclear and imprecise method of submission employed by the State.

Finally, the State argues it has satisfied the obligation to submit Chapter 262, Session Laws of 1965, and Chapter 997, Session Laws of 1967, because these provisions were included in later laws submitted to the Attorney General. The court below rejected this argument relying on the decision of this Court in *McCain v. Lybrand*, 465 U.S. 236, 104 S.Ct. 1037 (1984). In *McCain*, a 1971 submission to the Attorney General was made under the Voting Rights Act. The law amended an earlier statute which was itself never submitted for preclearance. This Court expressly held that the fact the later law was approved did not act as a submission and preclearance of the earlier legislation. See 104 S.Ct. at 1049. The facts of *McCain* as they relate to this question are so similar to those of the present case that the rule should be applied here and the argument of the State for submission by incorporation should be rejected.

## CONCLUSION

For the reasons stated herein, the Order of the Court below should be affirmed and this appeal dismissed.

Respectfully submitted,

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IN THE

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OCT. TERM, 1985

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JAMES G. MARTIN, *et al.*,

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ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NORTH CAROLINA

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## APPELLANTS' REPLY TO BRIEF FOR THE UNITED STATES

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

## APPELLANTS' REPLY TO BRIEF FOR THE UNITED STATES

The Solicitor General in his brief does not even acknowledge, much less apply, the standard devised by this Court for determining whether a particular governmental enactment is subject to preclearance under § 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. Almost every governmental decision could arguably have an effect on voting. A decision to raise the salaries of public officials could influence the decisions of potential candidates; a decision to reduce appropriations to public transportation could make it more difficult for voters to get to the polls. Knowing that no such fanciful purpose could have been entertained by Congress in enacting § 5, this Court has plainly stated the rule to determine whether a particular action must be submitted:

> Thus, in determining if an enactment triggers § 5 scrutiny, the question is not whether the provision is in fact innocuous and likely to be approved, but whether

> it has a *potential* for discrimination. See *Georgia v. United States,* [411 U.S. 526,] 534 [(1973)]; *Perkins v. Matthews,* [400 U.S. 379,] 383-385 [(1971)]; *Allen v. State Board of Elections,* [393 U.S. 544,] 555-556, n. 19, 558-559, 570-571 [(1969)].

*Dougherty County, Georgia, Board of Education v. White,* 439 U.S. 32, 42 (1978) (emphasis in original). Neither the Solicitor General, the appellees, nor the District Court has identified any potential for discrimination in any of the enactments which form the subject of this appeal. This Court certainly cannot affirm summarily this unprecedented application of the Voting Rights Act without making some determination that some potential for discrimination exists.

The burden cannot be upon the State to identify all possible theories of discrimination and to rebut each of them. It is clear that no such burden exists with regard to any aspect of § 5. This Court explained as much in its original decision upholding the constitutionality of the Act. Discussing the provisions of § 4 of the Act, 42 U.S.C. 1973b, which permit a jurisdiction to bail out from § 5 coverage, this Court stated that "an area need do no more than submit affidavits from voting officials, asserting that they have not been guilty of racial discrimination through the use of tests and devices during the past five years and then refute whatever evidence to the contrary may be adduced by the Federal Government." *South Carolina v. Katzenbach,* 383 U.S. 301, 332 (1965). The majority of the Senate Judiciary Committee in 1982 endorsed the continued application of this principle to the amended bailout procedure: "[S]hould the Justice Department or an intervenor alleges [*sic*] that specific practices or election methods, other than those analyzed by the applicant—do discriminate, the applicant would have to satisfy the court as to those." S. Rep. No. 97-417, 97th Cong., 2d Sess. 54 (1982). The principle of rebutting the allegations made by other parties also applies to the jurisdiction's burden of proof under § 5 in demonstrating whether a provision has the purpose or effect of denying or abridging the right to vote on the basis of race or color. *South Carolina v. Katzenbach, supra,* at 335. The same principle should apply in determining whether a particular enactment is subject to the provisions of § 5 in the first place. While the State may retain the ultimate burden of persuasion on the issue, at least

the plaintiff or the Justice Department should be required to identify the potential for discrimination which the State is expected to rebut.

Although the Solicitor General's brief contains no such allegations of potential for discrimination, he has filed with the Court a copy of the letter of April 11, 1986, from the Assistant Attorney General for Civil Rights to the State objecting to certain of the enactments involved in this appeal. The letter declares:

> The use of numbered posts, in combination with staggered terms for superior court judgeships in some districts, precludes minority voters from effective use of the election technique of single-shot voting, a technique that was available prior to the 1965 change. The elmination of the opportunity to single-shot vote plainly has a retrogressive effect in some districts on the ability of the minority community to participate meaningfully in the election of superior court judges. See, *e.g., City of Rome v. United States, supra,* 446 U.S. [156,] 183-85 [(1980)]. Our analysis indicates that the covered districts with minority voting age population of sufficient size to make single-shot voting effective are Districts 9, 12, and 18, as well as potentially Districts 1, 3, 4, 8, and 20.

Only if this Court agrees with this analysis can the District Court's judgment be affirmed. This analysis is unsupported by this Court's prior decisions or by the language of the Act, and is in fact contradicted by positions taken by the Solicitor General himself in *Thornburg v. Gingles,* No. 83-1968.

As the Solicitor General correctly notes, Brief for the United States at 6, § 14(c)(1), 42 U.S.C. 19731(c)(1), extends the protection of the Act to "all action necessary to make a vote effective." This Court recognized in *City of Rome* that the practice of single-shot voting may be necessary to make a vote effective in the context of elections for multi-member representative bodies, such as the City Commission and Board of Education involved in that case. The Court explained:

> "Single-shot voting enables a minority group to win some at-large seats if it concentrates its vote behind a limited number of candidates and if the vote of the

> majority is divided among a number of candidates." U.S. Commission on Civil Rights, The Voting Rights Act: Ten Years After, pp. 206-207 (1975).

446 U.S. at 184 n.19. The Court found that changes inhibiting single-shot voting "would dilute Negro voting strength." *Id.*, at 183. This Court thus recognized that minorities may wish to use strategic voting to maximize their influence in representative bodies, and, thus, laws which either enhance or inhibit that potential come within § 14's definition of "action necessary to make a vote effective."

Neither this Court nor any other has ever recognized that minorities have a legitimate interest in using single-shot voting to elect individual judges who do not sit with other judges in a representative capacity and who are bound by law to serve, not the interests of minority voters, but the law itself. This Court has explicitly recognized that judges are not representatives as are executive and legislative officials. *Wells v. Edwards,* 409 U.S. 1095 (1973), aff'g, 347 F. Supp. 453 (M.D.La. 1972); *Holshouser v. Scott,* 409 U.S. 807 (1972), aff'g, 335 F. Supp. 932 (M.D.N.C. 1971). Concepts of dilution, devised in the context of legislative and executive representation, simply have no application to the election of trial judges.[1] As this Court has previously noted in the representative context, "More generally, still in suspense is definitive judgment about the long-range impact of voting systems and malapportionment on legislative output." *Whitcomb v. Chavis,* 403 U.S. 124, 154 n.33 (1971). Clearly, the effect of single-shot voting on judicial output must be even more unclear. This Court certainly cannot conclude without argument that such voting systems have a potential for discrimination in a judicial context.

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[1]The Solicitor General fails to comprehend this point at page 7 of this brief. The point is not merely that this Court has refused to apply one-man one-vote doctrine to the judiciary, but that this Court has refused so to apply *Reynolds v. Sims,* 377 U.S. 533 (1964). *Reynolds* is the source of both the one-man one-vote doctrine and the dilution doctrine. See also *Fortson v. Dorsey,* 379 U.S. 433 (1965). See generally Jurisdictional Statement at 7-9. Both concepts are inextricably bound up with the area of representation, not the judiciary. Moreover, the extension of the dilution doctrine to the judiciary carries the potential for even further politicization of the bench. Cf. *Bandemer v. Davis,* 603 F. Supp. 1479 (S.D. Ind. 1984), prob. juris. noted, _____ U.S. _____, 105 S. Ct. 1840 (1985).

It is apparent from the Assistant Attorney General's letter that the only potential for discrimination which he finds in North Carolina's judicial system is the claim which the Solicitor General has already rejected in his analysis of North Carolina's legislative system. "[I]f the 'gravamen' of appellees' claim is simply that North Carolina chose to use multimember districts where 'there are sufficient concentrations of black voters to form majority black single-member districts' (J.S. App. 4a), their claim necessarily falls short of establishing a violation." Brief for the United States at 21, *Thornburg v. Gingles*, No. 83-1968. But it is quite plain that no right of minority voter to elect minority candidate exists. "But the right to equal participation in the political process does not protect any 'political group,' however defined, from electoral defeat." *City of Mobile v. Bolden*, 466 U.S. 55, 77 (1980) (Opinion of Stewart J.).[2] See generally Jurisdictional Statement at 10.

No one has better explained this principle than the Solicitor General himself, at page 31 of his brief in *Thornburg v. Gingles*:

> It was firmly settled prior to 1982 that no person had the right to be represented by members of any particular group to which he belongs or to participate in an electoral process that maximizes his chances of success, either as a voter or a candidate. Rather, the principle repeatedly endorsed was the right to participate in an electoral process—to vote, first and foremost, but also to join a political party, to participate in its affairs, to become a candidate (*Whitcomb*, 403 U.S. at 149-150)—in which there is no "built-in bias" against the opportunity to participate (*id.*, at 153). Amended Section 2 reaffirmed these principles. See Senate Report 23-24, 30.

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[2]The Solicitor General relies upon this Court's agreement in *City of Mobile* that the former version of § 2 of the Voting Rights Act, 42 U.S.C. 1973, is identical to the Fifteenth Amendment to imply that this Court would approve the application of that amendment to intentional discrimination in the design of judicial election systems in *Voter Information Project, Inc., v. City of Baton Rouge*, 612 F. 2d 208 (5th Cir. 1980). Brief for the United States at 6-7 & n.6. As this Court well knows, the plurality in *City of Mobile* concluded that the Fifteenth Amendment guarantees nothing more than the right to register and vote free from racial discrimination. 446 U.S. at 65-66 (Opinion of Stewart, J.) A majority of this Court has never disagreed with that statement, nor has any other Court ever agreed with the Fifth Circuit's position in *Voter Information Project*.

If this Court's forthcoming decision in *Thornburg* agrees with the Solicitor General that minority voters have no right to elect minority candidates, or if the concept of dilution simply does not apply outside a representative context, then the ability to engage in single-shot voting is not "necessary to make a vote effective," and there is no potential for discrimination which would subject these enactments to § 5 coverage.

The Solicitor General's contention that the application of § 5 to judicial elections is supported by consistent administrative practice and legislative intent is little short of ludicrous. This Court has noted that a "contemporaneous administrative construction of the Act is persuasive evidence of the original understanding." *United States v. Board of Commissioners of Sheffield, Alabama,* 435 U.S. 110, 131 (1978). The statements of a former assistant attorney general and a former acting assistant attorney general for civil rights, Jurisdictional Statement, App. at A-13, A-14, A-48, A-49, clearly establish that the "contemporaneous administrative construction" was that § 5 did not apply to judicial elections. The fact that the Department of Justice has apparently since changed its position does not shed any light at all on "the original understanding." As this Court has reiterated just this month:

> The fact that the agency's interpretation "has been neither consistent nor long-standing...substantially diminishes the deference to be given to [its] present interpretation of the statute." *Southeastern Community College v. Davis,* 442 U.S. [397,] 412, n. 11 [(1979)] (citing *General Electric Co. v. Gilbert,* 429 U.S. 125, 143 (1976)).

*Bowen v. American Hospital Ass'n,* _____ U.S. _____, No. 84-1529, slip. op. at 34 n.34 (June 9, 1986) (Opinion of Stevens, J.)

The administrative record is decidedly weak. The Solicitor General asserts that on four separate occasions between 1968 and 1974 the Department failed to object to submissions involving judgeships. None of the letters from the Department of Justice in those cases contained a clear assertion of jurisdiction; a simple failure to object is hardly a reasoned determination that jurisdiction exists. Only twice in the 20-year history of the Act, prior to this case, has the Attorney General maintained an

objection to enactments involving the judiciary; both took place in Alabama, one in 1972, and the other in 1976. The Solicitor General is not even forthright enough to admit that the objections to the creation of judgeships in Louisiana were in fact withdrawn. Extension of the Voting Rights Act: Hearings before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 2260 (1981).[3]

The Solicitor General's implication that Congress has approved this supposed "contemporaneous administrative construction" is even harder to credit. The two Alabama objections are found in a small-print chart as an appendix to the hearings before a House Judiciary Subcommittee. *Id.*, at 2246-47. The Solicitor General cites no evidence that any member of Congress or any witness from the Department of Justice ever actually spoke or wrote a single word concerning the application of § 5 to the judiciary. A legitimate effort to explain legislative intent would involve an analysis of the words of members of Congress themselves, much like that performed by the Solicitor General in his brief in *Thornburg v. Gingles,* No. 83-1968, at 7-19. It is not a treasure hunt for buried footnotes.

Nor is the complete silence of Congress on the subject of the application of § 5 to the judiciary a matter of such inconsequence as the Solicitor General suggests. Brief for the United States at 6 n. 5. Just this month this Court has rejected a similar attempt by the Solicitor General to defend with Congressional silence an effort to impose vast new federal controls upon an area traditionally left to the States. As the plurality explained:

> . . . Congress has failed to indicate, either in the statute or the legislative history, that it envisioned federal superintendence of treatment decisions traditionally entrusted to state governance. "[W]e must assume that the implications and limitations of our federal system

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[3]The Louisiana enactments involved the creation of two judgeships in the City of Baton Rouge "to be elected at-large by majority-vote to a designated post." These structures, which inhibit single-shot voting, are similar to those found in North Carolina. The Solicitor General completely fails to explain why the North Carolina procedures have the potential for discrimination while the Louisiana procedures do not. This Court's summary affirmance of the District Court's judgment will give no guidance to State officials who must wrestle with the Department's inexplicable and capricious changes of position.

> constitute a major premise of all congressional legislation, though not repeatedly recited therein." *United States v. Gambling Devices,* 346 U.S. 441, 450 (1953) (opinion of Jackson, J.). Congress therefore "will not be deemed to have significantly changed the federal-state balance," *United States v. Bass,* 404 U.S. 336, 349 (1971)—or to have authorized its delegates to do so—"unless otherwise the purpose of the Act would be defeated," *Trade Comm'n v. Bunte Bros.,* 312 U.S. 349, 351 (1941).

*Bowen v. American Hospital Ass'n, supra,* slip op., at 32 (June 9, 1986) (Opinion of Stevens, J.) (footnotes omitted). See also *Pierson v. Ray,* 386 U.S. 547 (1967). The Solicitor General has not made the slightest showing that "the purpose of the Act would be defeated" if the Department of Justice is not authorized to veto routine decisions by a State on the structure of its judiciary.

Had Congress intended to confer such power on the Department of Justice, clearly that proposal would have attracted public attention. As the plurality reasoned in *Bowen,* the absence of such attention indicates the absence of any such intent:

> As the Court of Appeals noted, there is nothing in the legislative history that even remotely suggests that congress contemplated the possibility that "section 504 could or would be applied to treatment decisions, involving defective newborn infants." [*United States v. University Hospital,*] 729 F.2d 144, 159 ([2d Cir.] 1984).
>
> "'As far as can be determined, no congressional committee or member of the House or Senate ever even suggested that section 504 would be used to monitor medical treatment of defective newborn infants or establish standards for preserving a particular quality of life. No medical group appeared alert to the intrusion into medical practice which some doctors apprehend from such an undertaking, nor were representatives of parents or spokesmen for religious beliefs that would be affected heard.'" *Id,* at 158 (quoting *American Academy of Pediatrics v. Heckler,* 561 F. Supp. [395,] 401 [(D.D.C. 1983)].

*Bowen v. American Hospital Ass'n*, slip op. at 32-33 n.33. (Opinion of Stevens, J.). Similarly, the views of bar groups, judges, and state officials have never been heard by Congress in considering whether to grant the Department of Justice such authority over state officials. As in *Bowen*, the inevitable conclusion is that Congress never had any such intent.

The inescapable truth is that the only possible basis for the application of § 5 to the judiciary is this Court's opinion in *Allen*. Neither the Solicitor General, the appellees, nor the District Court has even attempted to explain why the District Court's judgment in this case is an inevitable or even a proper extension of *Allen*. Such an extension of *Allen* raises several troubling questions. The Solicitor General's brief does nothing to resolve them; indeed, it heightens the concern felt by the State.

The Solicitor General asserts, "It is not necessary to the resolution of this case for the Court to consider whether changes in jurisdictional amounts or redistribution of trial and appellate jurisdiction are changes affecting voting (see J.S. 14)."[4] Brief for the United States at 7-8 n.9. However, this Court should be aware of the Department's schizophrenic approach to this issue. Two courts have already ruled that § 5 preclearance is required where "the change involved reallocates governmental powers among elected officials voted upon by different constituencies." *Horry County v. United States*, 449 F. Supp. 990, 995 (D.D.C. 1978). Accord, *Hardy v. Wallace*, 603 F. Supp. 174, 178-79 (N.D. Ala. 1985). The *Hardy* case is especially disturbing, since it reproduces the letters of the Assistant Attorney General as Appendices A and B to its opinion. *Id.*, 179-82. In his letter of June 18, 1984, the Assistant Attorney General interposed an

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[4]Nor is it necessary to the resolution of this case for this Court to consider the applicability of § 5 to "statutes that abridge the right of blacks to vote for judges." Brief for the United States at 7. Any enactment restricting access to the ballot itself would require preclearance under § 5 as a "voting qualification or prerequisite to voting." "That is not what the statutes at issue do." *Id.*, at 7-8 n.9. These statutes deal with the structure of North Carolina's judicial system, and the District Court found them to constitute a "standard, practice, or procedure with respect to voting" within the meaning of § 5. Jurisdictional Statement, App., at A-5. The issue presented by this appeal is whether that holding was correct.

objection based on *Horry County*. In his letter of October 31, 1984, he withdrew that objection, but indicated that *Horry County* would apply under certain circumstances. North Carolina and her sister States certainly deserve the full consideration of this Court before being required to submit their jurisdictional statutes to a Justice Department that plainly does not know what to do with them.

Even more disturbingly, the Solicitor General offers the completely gratuitous suggestion that "if blacks within any given judicial district do not have an equal opportunity to elect candidates of their choice to the bench, that may well violate Section 2." Brief for the United States at 7. The Solicitor General apparently cannot read a simple statute. Under § 2(b) of the Act, 42 U.S.C. 1973(b), the voters are entitled to an equal opportunity "to participate in the political process and to elect *representatives* of their choice." (Emphasis added) In the decision from which that language was drawn, this Court used the word "legislators." *White v. Regester,* 412 U S. 755, 766 (1973). When Congress abandoned this Court's word, it could have chosen the word "candidates," but did not choose to do so, plainly recognizing that the concept of dilution applies only to representatives and not to those officials, like judges, who do not serve in a representative capacity. The application of § 2 to the judiciary would extend the Act's impact on the structure of the judiciary, not only to those States covered by § 5, but to all fifty States.

Indeed, the Solicitor General is not alone in his implication that the District Court's decision in this case necessarily requires the application of § 2 as well to the judiciary. The United States District Court for the Southern District of Mississippi has concluded that black plaintiffs have shown a substantial likelihood of success on the merits of their challenge under § 2 to the use of multi-member judicial districts in that State. Accordingly, the Court has issued a preliminary injunction barring this year's judicial elections in that State. *Kirksey v. Allain,* Civ. No. J85-0960(B) (May 28, 1986).[5]

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[5]The order was premised upon an earlier opinion of May 21, 1986, explaining an earlier order of April 3, 1986, of a three-judge court in the same case enjoining elections in some judicial districts for failure to submit new statutes under § 5. In support of its decision, the Court specifically relied upon the District Court's decision in this case. The order of the three-judge District Court has been appealed to this Court. Copies of the order, opinion, and notice of appeal have been lodged with the Clerk and served upon other counsel.

Thus, the disruption of the judicial systems of other States by the District Court's judgment in this case is not merely potential, but actual. The question of whether § 5 of the Voting Rights Act should be applied at all to the structure of a state's judiciary is one of first impression. That question necessarily includes the question of whether the specific structures of North Carolina's judicial system carry a potential for discrimination; the resolution of that question turns upon whether this Court should extend its previous dilution cases to cover the judiciary, likewise a question of first impression. These are undeniably substantial federal questions. It would be peculiarly inappropriate for this Court to affirm the District Court's judgment summarily without giving North Carolina and other affected jurisdictions a full opportunity to be heard.

## CONCLUSION

For the reasons stated herein and in the Jurisdictional Statement, this Court should note probable jurisdiction and reverse the judgment of the District Court.

Respectfully submitted,

LACY H. THORNBURG
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STATE OF NORTH CAROLINA

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this day served three (3) copies of the foregoing Jurisdictional Statement upon the persons indicated below by depositing same in the United States mail, first-class postage prepaid, addressed to the following:

Mr. Allen Foster
Mr. Kenneth Gumbiner
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The Honorable Charles Fried
Solicitor General
Department of Justice
Washington, D.C. 20530

This the 17 day of June, 1986

James Wallace, Jr.
Assistant Attorney General
State of North Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
MAY 02 1986
CLARENCE A. PIERCE, CLERK
BY _____ DEPUTY

HENRY KIRKSEY, ET AL., individually and on behalf of all others similarly situated,

Plaintiffs

versus

CIVIL ACTION
NO. J85-0960(B)

WILLIAM A. ALLAIN, ET AL.,

Defendants

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that William A. Allain, Governor of Mississippi, Edwin L. Pittman, Attorney General of Mississippi, and Dick Molpus, Secretary of State of Mississippi, in their official capacities and as members of the Mississippi State Board of Election Commissioners, and the Mississippi State Board of Election Commissioners, Defendants in the above captioned action, hereby appeal to the Supreme Court of the United States from the final order and injunction entered in this action on 3 April, 1986.

This appeal is taken pursuant to 28 U.S.C. Sec. 1253 and 42 U.S.C. Sec. 1973c.

This the 2nd day of May, 1986.

EDWIN LLOYD PITTMAN
ATTORNEY GENERAL OF THE
STATE OF MISSISSIPPI

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CERTIFICATE OF SERVICE

I, Stephen J. Kirchmayr, one of the Attorneys for the State Defendants, hereby certify that I have this day mailed via United States Postal Service, first-class postage prepaid, a true and correct copy of the foregoing Notice of Appeal To the Supreme Court of the United States to the following persons at their last known mailing address:

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This the 24 day of May, 1986.

Stephen J. Kirchmayr

Stephen J. Kirchmayr

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
MAY 21 1986
CLERK
BY DEPUTY

HENRY KIRKSEY, ET AL. PLAINTIFFS

VS. CIVIL ACTION NO. J85-0960(B)

WILLIAM A. ALLAIN, ET AL. DEFENDANTS

MEMORANDUM OPINION AND ORDER

Plaintiffs, a class consisting of 25 black, registered voters in Mississippi, filed suit alleging Defendants[1] violated the Fourteenth and Fifteenth Amendments and §§2 and 5 of the Voting Rights Act of 1965, as amended, by failing to: (1) submit for preclearance under §5 of the Voting Rights Act certain Missis-

sippi statutes pertaining to judicial elections; (2) adhere to the "one-person, one-vote" principle in the creation of chancery and circuit court districts in Mississippi; and (3) draw district lines for judicial elections which do not dilute black voting strength. Plaintiffs also claim that the use of multi-member judicial districts for the election of some judges dilutes black voting strength in violation of §2 of the Voting Rights Act and

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[1]Defendants are: William A. Allain, Governor of Mississippi; Edwin L. Pittman, Attorney General of Mississippi; Dick Molpus, Secretary of State of Mississippi; in their official capacities and as members of the Mississippi State Board of Election Commissioners; State Board of Elections Commissioners; State of Mississippi Democratic Party Executive Committee, by and through its Chairman, Steve Patterson; and State of Mississippi Republican Party Executive Committee, by and through its Chairperson Ebie Spivey.

the Fourteenth and Fifteenth Amendments. This matter is presently before the Court on Plaintiffs' Motion for a Temporary Restraining Order and a Preliminary or Permanent Injunction and/or a Declaratory Judgment, requesting the three-judge court[2], convened pursuant to 28 U.S.C. §2284 and 42 U.S.C. §1973(c), to: (1) declare that certain Mississippi statutes pertaining to state judicial elections are subject to §5 of the Voting Rights Act; and (2) enjoin enforcement of those statutes which have not been precleared pending compliance with §5 of the Voting Rights Act.

Following oral argument on Plaintiffs' Motion, the three-judge court delivered a bench opinion, holding that: (1) §5 of the Voting Rights Act applies to Mississippi legislative and executive action which establishes or seeks to administer any voting qualification or prerequsite to voting, or standard, practice or procedure with respect to voting for judicial elections; (2) enforcement or implementation of any Mississippi legislative or executive action which establishes or seeks to administer any voting qualification or prerequisite to voting, or standard, practice or procedure pertaining to the conduct of judicial elections which is different from that in force and effect on November 1, 1964, the effective date of the Voting Rights Act, or

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[2]On March 25, 1986, a three-judge court, composed of Chief Judge Charles Clark for the United States Court of Appeals for the Fifth Circuit and Judges William H. Barbour, Jr. and Henry T. Wingate for the United States District Court for the Southern District of Mississippi, was convened to determine whether the changes in voting for judicial elections are covered by §5 of the Voting Rights Act of 1964, as amended, 42 U.S.C. §1973(c), and, if so, whether Defendants have implemented the changes without preclearance, and if so, what relief is appropriate. See, e.g., Lockhart v. United States, 460 U.S. 125 (1983).

which is different from a statute that has been precleared pursuant to §5 should be enjoined; and (3) legislative recodification of Mississippi statutes which do not change the voting qualifications or prerequisites to voting, or standards, practices or procedures with respect to voting for judicial elections as they existed on November 1, 1964, or as precleared by the United States Attorney General should not be enjoined. This Opinion states the reasons for the ruling of the three-judge court.

Section 5 of the Voting Rights Act, 42 U.S.C. §1973(c), requires a State to submit "any voting qualification or prerequisite to voting, or standard, practice or procedure. . . different from that in force and effect on November 1, 1964" to the Attorney General for preclearance or institute an action in the United States District Court for the District of Columbia for a declaratory judgment that any such qualification, prerequisite to voting, or standard, practice or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. The United States Supreme Court, "[a]fter canvassing the legislative history of the [Voting Rights] Act," concluded that Congress, by enacting the Voting Rights Act, meant "to reach any state enactment which altered the election law of a covered State in even a minor way." Dougherty County, Georgia Board of Education v. White, 439 U.S. 32, 37 (1978) (quoting Allen v. State Board of Elections, 393 U.S. 544 (1969)). Indeed, the Supreme Court in Allen stated that Congress intended §5 to reach "all changes, no matter how small. . . ." 393 U.S. at 568.

In cases following Allen which interpreted §5, the Supreme Court has "consistently adhered to the principles of broad construction set forth in Allen." Dougherty County, Georgia Board of Education v. White, 439 U.S. at 38. This principle of broad construction recently led the United States District Court for the Eastern District of North Carolina, in Haith v. Martin, 618 F.Supp. 410, 413 (E.D.N.C. 1985), pet. for cert. filed, 54 U.S.L.W. 3463 (Dec. 6, 1985), to hold that ". . .the fact that an election law deals with the election of the judiciary does not remove it from the ambit of §5." Given the expansive interpretation of the Voting Rights Act and §5, this Court is compelled to agree with the pronouncement in Haith v. Martin.

Defendants urge us to reject the holding in Haith v. Martin and exempt judicial elections from the scope of §5 because: (1) §2(b) of the Voting Rights Act demonstrates that the Act applies only to "representatives"; (2) the Voting Rights Act and its dilution concept do not apply to judicial elections; and (3) the State relied upon the interpretation of the United States Department of Justice that the Act excludes judicial elections.

Section 2(b) of the Voting Rights Act, 42 U.S.C. §1973(b), states that:

> A violation of [the Act]. . .is established if. . .it is shown that the political processes leading to nomination or election. . .are not equally open to participation by members of a class of citizens protected by [the Act] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. [Emphasis added].

Defendants argue that since the term "representative" does not include judges, see, e.g., Holshouser v. Scott, 335 F. Supp. 928 (M.D.N.C. 1971), aff'd., 409 U.S. 807 (1972); Buchanan v. Rhodes, 249 F.Supp. 860 (M.D.Ohio 1966), appeal dismissed, 385 U.S. 3 (1966), then the Voting Rights Act does not apply to judicial elections. However, §5 of the Voting Rights Act does not contain such a limitation. Section 5 states that any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964, must be submitted for preclearance to the Attorney General or be declared by the United States District Court for the District of Columbia not to have the purpose or effect of denying or abridging the right to vote on account of race or color. Clearly, the unqualified language of §5 coupled with the expansive interpretation given §5 by the United States Supreme Court mandates that judicial elections are subject to §5 of the Votihg Rights Act. As stated in Haith v. Martin, 618 F.Supp. at 413, ". . .the Act applies to all voting without any limitation as to who, or what, is the object of the vote."

Defendants next rely on decisions holding that the dilution concept under the Fourteenth and Fifteenth Amendments does not apply to state judicial elections. Defendants' reliance on these decisions is misplaced. None of these decisions dealt with, or attempted to interpret, the Voting Rights Act. Accordingly, these decisions have no application here where the Voting Rights Act is at issue.

Finally, Defendants submit that the Voting Rights Act does not apply to the state judiciary because the Department of Justice has interpreted the Act as not applying to the state judiciary.[3] Even assuming administrative interpretations are to be given deference in this field of the law, cf. United States v. Board of Comm'rs of Sheffield, 435 U.S. 110 (1978), these Defendants cannot claim reliance on the administrative interpretations of the Department of Justice. In the past, these Defendants have sought and obtained from that Department preclearance of statutes pertaining to judicial elections. Indeed, the record before us fails to show that the Department of Justice has ever refused to consider a statute submitted to it by Mississippi on the ground that the statute pertained to judicial elections.

Alternatively, Defendants submit that certain statutes challenged by Plaintiffs are merely a recodification of laws that existed prior to the effective date of the Act and, therefore, are not subject to §5. The Court agrees. Section 5 is triggered only in instances where the voting qualification or prerequisite to voting, or standard, practice or procedure for voting is "different from" that in full force and effect on November 1, 1964. To the extent that recodification of laws does not change the voting qualification or prerequisite to voting, or standard,

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[3]The Court notes that Defendants offered no proof to show that the Department of Justice does indeed interpret the Act to exclude judicial elections, nor has done so in the past, and merely argued this position in opposition to Plaintiffs' Motion.

practice or procedure for voting as it existed on November 1, 1964, or as precleared, those particular laws are not subject to §5 or the injunction ordered by this Court.

Accordingly, Plaintiffs' Motion for a Temporary Restraining Order and Preliminary or Permanent Injunction and/or a Declaratory Judgment is hereby granted pending preclearance of the affected statutes or further order of this Court.

ORDERED this the 21st day of May, 1986.

UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT JUDGE

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
MAY 28 1986
CLARENCE A. PIERCE, CLERK
BY _____ DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

HENRY KIRKSEY, et al.,
on behalf of themselves
and all others similarly
situated,

Plaintiffs,

NATHAN P. ADAMS, JR. AND
NAT W. BULLARD,

Plaintiffs-Intervenors,

v. CIVIL ACTION NO. J85-0960(B)

WILLIAM A. ALLAIN, Governor of
Mississippi, et al.,

Defendants.

ORDER

This civil action came on for hearing on May 27, 1986, on the plaintiffs' Motion for A Temporary Restraining Order and/or Preliminary and/or Permanent Injunction which the court and the parties have treated as a request for preliminary injunctive relief enjoining the defendants from conducting any elections for the offices of circuit judge in the State of Mississippi, chancery judge in the State of Mississippi, and county judge in only Harrison County, Hinds County, and Jackson County, Mississippi, pending this court's trial and decision on the merits of the plaintiffs' claims for relief under

Section 2 of the Voting Rights Act of 1965, as amended in 1982, 42 U.S.C. § 1973, 42 U.S.C. § 1983, and the Fourteenth and Fifteenth Amendments to the United States Constitution and the entry of a future order of the court rescheduling such elections.

Having considered the motion, the supporting and opposing briefs, the documentary evidence received into evidence at the hearing, and the four well-established prerequisites for the granting of a preliminary injunction, see, e.g., Canal Authority v. Callaway, 489 F.2d 567, 572-77 (5th Cir. 1974), the court rendered a bench opinion at the conclusion of the hearing in which it stated its findings of fact and conclusions of law required by Fed. R. Civ. P. 52(a). For the reasons stated in that bench opinion, the court hereby rules that plaintiffs have satisfied the conditions for a preliminary injunction:

1. Plaintiffs have shown a likelihood of success on the merits. In light of the exhibits presented to this court, plaintiffs have shown that they will probably prove a history of past racial discrimination in Mississippi which has an effect upon the ability of black citizens of Mississippi to elect judicial candidates of their choice; racially polarized voting in Mississippi elections; socio-economic disparities between black and white

citizens of Mississippi, with blacks being less affluent and less well educated; a lack of prior electoral success by black judicial candidates in contested elections; and that at the trial on the merits the key issue will be the continued use of multi-member districts. Plaintiffs have therefore shown some probability of success on the merits.

2. Irreparable injury will ensue to the black plaintiff class should elections go forward and the present electoral system ultimately be found in violation of the rights protected by the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the United States Constitution. Additionally, irreparable injury will befall plaintiff-intervenors, the incumbent Chancery Court judges for the Ninth District, should elections go forward, campaign expenses be incurred, and such elections be nullified by subsequent order of this court.

3. The relative harm to plaintiffs from the denial of an injunction will exceed the harm to defendants from the granting of such an injunction. Defendants have pointed to the risk of lower vote turnout should the elections not be held as scheduled as the only identifiable potential harm to the state defendants.

4. The public interest will best be served by the granting of an injunction. In light of the order of April 3, 1986, by a three-judge court in this matter enjoining

some of the judicial elections under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, the risk of confusion to the voters of divergent election dates for the challenged judgeships, the need to hold new elections should plaintiffs prevail, and the possible preclusion of special appointments of incumbent judges who were defeated at the polls, this court finds that the best interests of all concerned are met by entering the following injunction.

Therefore, the court finds and concludes that the plaintiffs' motion is meritorious and should be granted.

IT IS, THEREFORE, ORDERED AND ADJUDGED:

1. That, pending a final decision by this court in this action and the entry of a future order of this court scheduling elections for the affected judicial offices, defendants William A. Allain, in his official capacity as Governor of Mississippi and as a member of the State Board of Election Commissioners; Edwin L. Pittman, in his official capacity as the Attorney General of Mississippi and as a member of the State Board of Election Commissioners; Dick Molpus, in his official capacity as Secretary of State of Mississippi and as a member of the State Board of Election Commissioners; the Mississippi State Board of Election Commissioners; the Democratic

Party of the State of Mississippi State Executive Committee; and the State of Mississippi Republican Party State Executive Committee, and their officers, agents, servants, employees, and attorneys (the defendants) are hereby ENJOINED AND PROHIBITED from conducting any primary election or general election in the State of Mississippi for all circuit judge offices in the State of Mississippi, all chancery judge offices in the State of Mississippi, and the county court judge offices in Harrison, Hinds, and Jackson Counties;

2. That, given the nearness of the June 3, 1986, primary and the fact that ballots have been prepared for the primary election which include the offices subject to this injunction, the court hereby directs how the defendants and all other election officials may comply with the injunction contained in Paragraph 1 above:

A. That, in the event that any ballots have not been finalized, the defendants and all other election officials are directed to delete from any such ballot the offices subject to the injunction contained in Paragraph 1 above;

B. That, in the event that ballots have been prepared which include the offices subject to the injunction contained in Paragraph 1, the defendants and all other election officials need not prepare new ballots. However, the defendants and all other election

officials are hereby directed not to tabulate, total, tally, recap, publish, disclose, reveal, or otherwise disseminate any votes or the number of votes which may be cast for the offices which are subject to this injunction;

C. That, in those counties utilizing voting machines which can "block out" from voting by the electors these particular offices subject to this injunction, the defendants and all other election officials are directed to "block out" such offices; and

D. That, in those counties utilizing voting machines which cannot mechanically "block out" selected offices on the previously prepared ballot, the defendants and all other election officials are enjoined not to publish, disclose, reveal, or otherwise disseminate any totals or tallies which may be automatically recorded by such machines for the particular offices which are subject to this injunction;

3. That the defendant Secretary of State is hereby directed to give prompt telephonic notification to all state and county Democratic and Republican Party Executive Committees and all circuit clerks/county registrars of the provisions of this injunction and the Secretary of State shall follow-up on such telephonic notification by mailing a written notice; and

4. That the injunction contained in this order applies only to all offices of circuit judge in the State of Mississippi, all offices of chancery judge in the State of Mississippi, and all county judge offices in Harrison, Hinds, and Jackson Counties, Mississippi. This order does not apply to any other offices which may be on the ballot on June 3, 1986, or thereafter, and it specifically does not apply to or affect the election of:

Supreme Court Justices;

County Judge in those counties which have a county court and only one county judge: Adams, Bolivar, Coahoma, DeSoto, Forrest, Jones, Lauderdale, Lee, Leflore, Lowndes, Madison, Pike, Rankin, Warren, Washington, and Yazoo Counties;

Youth Court Judge in Clay County; or

Family Court Judge in Harrison County.

SO ORDERED AND ADJUDGED, on this, the 23rd day of May, 1986.

/s/ William H. Barbour, Jr.
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

Carroll Rhodes
Attorney for Plaintiffs

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Deputy Attorney General
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Samuel Issacharoff
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Supreme Court, U.S.
FILED
JUN 4 1986
JOSEPH F. SPANIOL, JR.

No. 85-1066

# In the Supreme Court of the United States

OCTOBER TERM, 1985

JAMES G. MARTIN, ET AL., APPELLANTS

*v.*

TERRY L. HAITH

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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18 pp

## QUESTION PRESENTED

1. Whether Section 5 of the Voting Rights Act of 1965 requires changes in voting procedures for the election of judges in covered jurisdictions to be precleared by either the Attorney General or the United States District Court for the District of Columbia.

2. Whether any of the state laws in issue in this case, which introduced changes in the procedures for election of judges, should have been deemed "submitted" for preclearance because they were reenacted in later statutes that were precleared.

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# In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1066

JAMES G. MARTIN, ET AL., APPELLANTS

*v.*

TERRY L. HAITH

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

## STATEMENT

1. Appellee is a black citizen of North Carolina. He instituted this action to enjoin the election of superior court judges pursuant to state laws that had been passed between 1965 and 1983 but had not been precleared under Section 5 of the Voting Rights Act of 1965.[1] A statutory

[1] Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, bars certain covered jurisdictions from implementing any "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," without obtaining preclearance from either the Attorney General of the United States or the United States District Court for the District of Columbia. A jurisdiction seeking preclearance must demonstrate that the voting change in question "does not have the purpose and will not have the effect" of abridging the right to vote on account of race. It is undisputed that 40 counties

three-judge court was convened pursuant to 28 U.S.C. 2284 (see *Allen* v. *State Board of Elections,* 393 U.S. 544, 563 (1969)) (J.S. App. A2). On cross-motions for summary judgment, the court held that the state statutes were subject to Section 5, and enjoined their further implementation until they were precleared.[2]

a. As of November 1, 1964, only two of the state's 30 superior court districts had two judges, the rest having only one each. In the two two-seat districts, the candidates ran at large without specifying the seat for which they were running. The first change was enacted in 1965. Chapter 262 of the Session Laws (S.L.) of 1965 (1965 N.C. Sess. Laws 297) required the judges in multiseat districts to specify the seat for which they were running. After that, many additional districts were made into multiseat districts. Indeed, the other five state statutes at issue here all added judges in various districts. Those statutes are S.L. Chapter 997 (1967 N.C. Sess. Laws 1440), S.L. Chapters 1119, 1130 (1977 N.C. Sess. Laws 1405, 1414), S.L. Chapter 1238 (1977 N.C. Sess. Laws 181 (1978)),[3] and S.L. Chapter 1109 (July 1, 1984) (J.S. App. A3-A4). This last Act, together with S.L. Chapter 997 (1967) and S.L. Chapter 1119 (1977), gave most of the judges in newly created seats terms that were staggered from those of the original judges (*i.e.,* it gave them numbered posts so that candidates would run for a single, specified position).

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in North Carolina are subject to Section 5 of the Voting Rights Act (J.S. App. A4), and that the covered counties are affected by the state statutes in issue (*ibid.*).

[2] After the district court decided this case, North Carolina submitted the disputed state statutes to the Attorney General. We have lodged with the Clerk and served on the parties copies of the Assistant Attorney General's letters of April 11, 1986, and May 23, 1986, interposing objection to some of the changes and precleaving others.

[3] S.L. Chapters 1130 and 1238 added judges by splitting three judicial districts into six, thereby changing the boundaries of existing districts (J.S. App. A3-A4).

b. The appellants made three arguments below with respect to the challenged statutes:

(i) they argued that they were not required to seek preclearance of the laws in dispute, because Section 5 of the Voting Rights Act does not apply to changes in the law relating to the election of judges (J.S. App. A5);

(ii) they maintained that two of the challenged statutes, S.L. Chapter 262 (1965) and S.L. Chapter 997 (1967), had in fact been precleared because they were reenacted in subsequent years, included in laws that were submitted, and "precleared" by letters sent in April 1971 by Assistant Attorneys General Jerris Leonard and David L. Norman (J.S. App. A6-A7; see letters at J.S. App. A47-A49); and

(iii) they maintained that the above-mentioned April 1971 letter from David L. Norman, Acting Assistant Attorney General, contained language that misled them into believing that it was not necessary to submit changes in law relating to the election of judges (J.S. App. A7).

c. The facts on which claims "ii" and "iii" above are based are as follows:

On February 18, 1971, the State sent two packages of laws to the Assistant Attorney General for Civil Rights for preclearance. The first package consisted of 13 acts passed in 1967 (J.S. App. A18-A19); the second contained 14 acts passed in 1969 (J.S. App. A26).

The 1967 package contained two statutes having to do with the state judiciary. Chapter 775 (1967 N.C. Sess. Laws 775) (J.S. App. A21) recodified and amended the state's election code. In so doing, it reenacted the numbered-post provision contained in S.L. Chapter 262 (1965), which had never been submitted (see J.S. App. A16 para. 11). The reenactment did not effect any "change" in the relevant election law. The other statute was Chapter 1049 (1967 N.C. Sess. Laws 1516),(J.S. App. A21-A25). That statute had one provision pertaining to election of solicitors; the rest had to do with the power and duty of solicitors, and was generally unrelated to elections.

The 1969 package (J.S. App. A26) included, among other things, S.L. Chapter 1190 (1969 N.C. Sess. Laws 1369) (J.S. App. A28-A46). That Act contained a lengthy reenactment of the schedule of superior court judges for the entire state, incorporating the changes made by S.L. Chapter 997 (1967), which had never been submitted (see J.S. App. A16 para. 11). S.L. Chapter 1190 also included many pages of provisions that have nothing to do with election law.

The submissions of 1967 and 1969 were answered in reverse order. On April 20, 1971, Assistant Attorney General Jerris Leonard responded to the 1969 package, preclearing all but one of the 1969 acts (J.S. App. A47). On April 23, 1971, Acting Assistant Attorney General David L. Norman responded to the submission of 1967 laws (J.S. App. A48-A49). In that letter, in addition to preclearing most of the acts submitted, he noted that the State had submitted "several statutes, * * * such as the changes in the North Carolina court system, which did not deal with voting practices or procedures and, thus, are not subject to Section 5 of the Voting Rights Act."

2. The district court held that Section 5 contains no exception for election of judges. Noting this Court's decisions in *Dougherty County Board of Education* v. *White*, 439 U.S. 32 (1978), and *Allen* v. *State Board of Elections, supra,* the district court held that Section 5 requires preclearance of *all* changes, however minor, in the election law of a covered jurisdiction (J.S. App. A5-A6).

In addition, the district court held that under this Court's ruling in *McCain* v. *Lybrand,* 465 U.S. 236 (1984), and the Attorney General's Procedures for the Administration of Section 5, 28 C.F.R. 51.25, the two laws allegedly precleared had not been properly submitted for preclearance. It is not enough, under the Procedures, that the same language might appear in *later* statutes that were in fact precleared. In transmitting the later reenactments,

the court said, the State did not call any attention to the parts that constituted reenactments of post-November 1964, unprecleared laws (J.S. App. A6).

Finally, the district court held that it did not matter if the State claimed to have been misled by Acting Assistant Attorney General Norman, whose 1971 letter was read by the State to suggest that electoral laws pertaining to the judiciary did not need to be submitted. Under the Voting Rights Act, electoral changes affecting covered jurisdictions must be precleared; the district court held that it lacked authority to relieve any jurisdiction of that obligation even if the authorities had in fact been misled by Mr. Norman's letter (J.S. App. A7-A8).

## DISCUSSION

This case presents no novel or difficult legal question. Accordingly, there is no reason for plenary review, and this Court should summarily affirm the judgment of the three-judge district court. The plain words of the Voting Rights Act of 1965 state that, where judges are elected, voting discrimination is prohibited. In jurisdictions covered by Section 5, changes in the law affecting the election of judges must be precleared. There is no authority to the contrary.

The district court was clearly correct, moreover, in holding that even if Mr. Norman's April 1971 letter had been misleading, this would not estop the present Attorney General from seeking compliance with Section 5; nor, obviously, could it serve to divest the plaintiff, a black voter, of his right to seek and obtain an injunction against implementation of nonprecleared voting changes.

Finally, appellants' claim that the Assistant Attorney General precleared two of the statutes in issue, by preclearing their reenactment, is foreclosed by this Court's decision in *McCain* v. *Lybrand,* 465 U.S. 236 (1984).

1. a. As the district court held (J.S. App. A5-A6), the plain language of the statute is sufficient to dispose of appellants' contention that the Voting Rights Act does not apply to elections of judges. The Voting Rights Act, on its face, applies to "voting" for public office without exception.[4] Section 5, 42 U.S.C. 1973c, applies to "*any* voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" (emphasis added). "Voting" is defined in Section 14(c)(1), 42 U.S.C. 1973*l*(c)(1), to include

> all action necessary to make a vote effective in *any* primary, special, or general election, including, but not limited to, registration, listing pursuant to this [Act], or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast *with respect to candidates for public or party office and propositions for which votes are received in an election.* [Emphasis added.]

Where judges are elected rather than appointed, they are "candidates for public * * * office," and it seems beyond any doubt that the strictures of the Voting Rights Act apply. There is no legislative history to the contrary.[5]

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[4] Section 2(a) of the Voting Rights Act, 42 U.S.C. 1973(a), provides, for example, that

> [n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2).

[5] For the most part, appellants' only reliance on the legislative history is for its alleged silence with respect to the judiciary (J.S. 12-14). As we show below, the legislative history is not so silent with respect to judges as appellants suggest; and, if it were, that silence would hardly support the creation of an exception from a statute

Claims of intentional racial discrimination in the election of judges have been held cognizable under the Fifteenth Amendment (*Voter Information Project* v. *City of Baton Rouge,* 612 F.2d 208 (5th Cir. 1980)), and it follows that they are cognizable under Section 2 of the Voting Rights Act.[6] Yet, according to appellants, statutes that abridge the right of blacks to vote for judges need not be precleared under Section 5.[7] Congress enacted no such loophole.

b. Appellants contend that because the principle of "one-person-one-vote" has been held not to apply to

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whose plain terms encompass *all* elections for public office. Appellants' one attempt to construct an affirmative argument from the legislative history (J.S. 7) is strained indeed. Appellants contend that a witness in the 1975 extension hearings explained that the phrase "abridging the right to vote" in Section 5 meant diluting the vote, and they proceed to argue that the concept of vote dilution has no meaning with respect to the judiciary. Aside from the tenuous logic of this argument, the short answer is that the witness said only that the concept of abridgement "includes a dilution," not that the two concepts were identical. See *Extension of the Voting Rights Act: Hearings on H.R. 939, H.R. 2148, H.R. 3247, and H.R. 3501 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary,* 94th Cong., 1st Sess. Pt. 1, at 636 (1975).

[6] In *City of Mobile* v. *Bolden,* 446 U.S. 55, 60-61 (1980) (opinion of Stewart, J.), a plurality of this Court held that Section 2, before its 1982 amendment, "was intended to have an effect no different from that of the Fifteenth Amendment itself," and no Justice took issue with this statement. Apparently aware that the reliance on the Fifteenth Amendment in *Voter Information Project* implies that judicial elections are subject to the Voting Rights Act, appellants baldly assert that the case should have been decided under the Fourteenth Amendment alone (J.S. 14). Given the text and purposes of the two Amendments (see generally *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960)), this assertion is unsupportable.

[7] Appellants do not, and could not (see *NAACP* v. *Hampton County Election Comm'n,* No. 83-1015 (Feb. 27, 1985), slip op. 13-14), argue that the need to preclear a statute under Section 5 depends on

judicial elections (J.S. 8), judicial election changes are not subject to Section 5. This contention misses the point. "One-person-one-vote" is a constitutional doctrine independent of racial discrimination.[8] As such, this doctrine is not a concern of the Voting Rights Act. Changes in apportionment in covered jurisdictions must be submitted under Section 5, but the Attorney General examines those changes for racially discriminatory purpose or effect. The Attorney General could not interpose an objection under Section 5 for the reason alone that election districts were malapportioned, in the absence of racial purpose or effect. On the other hand, if blacks within any given judicial district do not have an equal opportunity to elect candidates of their choice to the bench, that may well violate Section 2—or a change having this impact in a covered jurisdiction may be denied Section 5 preclearance.[9]

c. Appellants' contention that application of Section 5 to judicial elections would constitute an enlargement of coverage, not contemplated by the Justice Department or Congress (J.S. 5-14), is factually incorrect. The Attorney

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whether it in fact abridges the right to vote. If appellants need not preclear their statutes relating to judicial elections, then no statute relating to judicial elections, no matter how pernicious, would have to be precleared.

[8] "[T]he various 'one man one vote' cases involving Judges make clear that they do *not* involve claims of race discrimination as such." *Voter Information Project,* 612 F.2d at 211 (footnote omitted).

[9] It is not necessary to the resolution of this case for the Court to consider whether changes in jurisdictional amounts or redistribution of trial and appellate jurisdiction are changes affecting voting (see J.S. 14). That is not what the statutes at issue do.

General has, from the start, treated judicial election laws as subject to preclearance, and has so informed Congress.

For example, on June 27, 1968, the Attorney General precleared amendments to the constitution of the State of Georgia that provided for superior court judges and solicitors to be elected within the circuits they served instead of statewide (Files S1523-S1524).[10] And in 1971, the Attorney General precleared a whole series of changes in Virginia's election law with respect to judges (Files V5084, V5518, and V5529). In 1973, the Attorney General registered "no objection" to a South Carolina submission relating, among other things, to election terms and duties of various clerks, coroners, sheriffs, and solicitors (File V5503). Similarly, in 1974, North Carolina itself submitted for preclearance Chapters 855 and 838 of the Session Laws of 1973 (1973 N.C. Sess. Laws 19 and 10 (1974)), which added judges to the state's superior court and district court system, and received a "no objection" letter in response (Files V6439-V6440).

The Attorney General has objected to certain changes in judicial election laws as well. On December 26, 1972, the Attorney General objected to an Alabama change from elected to appointed justices of the peace. This objection was brought to the attention of Congress when the Voting Rights Act extension of 1975 was under consideration.[11] It is also mentioned in one of the reports that Congress reviewed and appellants cite (J.A. 13).[12] On February 20, 1976, the Attorney General objected to an Alabama statute that combined two counties in a judicial district. This objection was brought to the attention of Congress

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[10] The United States has lodged with the Clerk and served on the parties those excerpts from its Section 5 files referred to in this brief.

[11] See *Extension of the Voting Rights Act: Hearing on H.R. 939, H.R. 2148, H.R. 3247, and H.R. 3501 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. Pt. 1, at 183 (1975) (Exhibit 5 to testimony of J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division).

[12] U.S. Comm'n on Civil Rights, *The Voting Rights Act: Ten Years After* 171 (1975). This report also notes the effect of the Voting

when the Voting Rights Act Extension of 1982 was under consideration.[13] On February 7, 1980, the Attorney General objected to a Louisiana statute and a Baton Rouge ordinance requiring certain judges to be elected at large by a majority vote. Congress was so advised.[14]

Thus, appellants are quite wrong in their assertion (J.S. 12, 15) that the Department of Justice has not construed the Voting Rights Act to apply to judicial elections.[15] They are also quite wrong to assert that Congress has never been advised that Section 5 "might in any way restrict the ability of a State to modify its judicial system" (J.S. 14). The number of objections to judicial elections may have been relatively small, but that factor has no bearing on the coverage of the Act. This Court, relying on the 1982 House Report, has noted that Congress expressly eschewed limiting the reach of Section 5 to those voting changes that have most frequently been the subject of objections. *NAACP* v. *Hampton County Election Commission,* No. 85-1015 (Feb. 27, 1985), slip op. 11 n.27. Section 5 of the Voting Rights Act covers judicial elections.

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Rights Act on the number of black elected law enforcement officials, including sheriffs, judges, justices of the peace, constables, and magistrates. *Id.* at 141, 287, 377.

[13] *Extension of the Voting Rights Act: Hearings Before the Sub-Comm. on Civil and Constitutional Rights of the House Comm. on the Judiciary,* 97th Cong., 1st Sess. Pt. 3, at 2247 (1982) [hereinafter cited as *1982 Hearings*] (Attachment 6 to Letter from James P. Turner, Acting Assistant Attorney General, Civil Rights Division, to Rep. Don. Edwards).

[14] *1982 Hearings 2260.*

[15] In fact, appellants themselves placed in the record an affidavit from a former Assistant Attorney General in charge of the Civil Rights Division that observes that a North Carolina statute dealing with judicial elections "would[,] today, have been required to be submitted and precleared under Section 5 of the Voting Rights Act" (J.S. App. A13 para. 4).

2. The letter sent by David L. Norman to the State of North Carolina in April 1971 should not have misled the State of North Carolina, and it appears that it did not. It said expressly that the statutes that did not need to be submitted were those that did *not* relate to voting and elections. See page 4, *supra*. Among the materials Mr. Norman reviewed were many statutory provisions that did not deal with voting practices or procedures. There was therefore little reason to "misunderstand" and conclude that acts *in fact* making changes in court-related "voting practices or procedures" need not be submitted in the future. That there was at least one identifiable *later* submission from North Carolina containing changes in the election laws for judges suggests that the State officials were not misled.

In any event, a misunderstanding on the part of a state official could not have estopped the Attorney General from enforcing Section 5 where it applied (see J.S. 18-20). Even when a government official gives a member of the public incorrect information, this Court has been extremely reluctant to conclude that this excuses the allegedly misled party from complying with the law. See, *e.g.*, *Schweiker* v. *Hansen*, 450 U.S. 785 (1981). As this Court noted in *Heckler* v. *Community Health Services*, 467 U.S. 51, 60 (1984) (footnote omitted):

> When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant.[16]

In this case, a fortiori, the relevant State official's claim to have been misled by Mr. Norman's letter cannot serve to "estop" third parties (*i.e.*, black citizens) from vin-

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[16] The facts in the present case would not give rise to an estoppel even against a private party, much less the government. In *Heckler* v.

dicating their rights under the Voting Rights Act. The district court was clearly correct in concluding that it had no authority to deny an injunction because of the State's claim that it was unsure of its obligations in the past.

3. Appellants argue that the Court should carve out an exception to the rule in *McCain* v. *Lybrand,* 465 U.S. 236 (1984), and treat two of the disputed acts as having been "precleared" because they were incorporated in later enactments that were, themselves, cleared. Apparently, the basis for an exception would be that the State did not intentionally circumvent the requirements of Section 5 (J.S. 20-21). But it is irrelevant, under Section 5, why a voting change was not submitted.

This Court explained in *Allen* v. *State Board of Elections,* 393 U.S. 544, 571 (1969), that the Attorney General cannot be deemed to have precleared a change in election laws unless it was explicitly and unambiguously submitted to him.[17] The reason should be obvious. If the submission does not appear to *change* existing law, the Attorney General (or his delegate) is going to assume that he need not review it.

For example, if the State submits a reenacted schedule of superior court judge positions in each judicial district, without comment, there is no way for the Attorney General to know that, hiding in that list, there is an unprecleared act from two years before. In fact, if he looks at the state code, he will reach the conclusion that the list

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*Community Health Services,* 467 U.S. at 59, this Court outlined the traditional elements as a "definite misrepresentation," in a circumstance in which the speaker has reason to know that the other will rely on it, and detrimental reliance. There was no such misrepresentation here, and there is no "detriment" to submitting legislation for preclearance later rather than sooner.

[17] The rule was incorporated in the first set of procedures governing Section 5 submissions (36 Fed. Reg. 18186, 18188 (1971)).

represents no "change" in any electoral law, for the change occurred two years before.

The district court was correct in holding that none of the statutes in issue had ever been properly submitted.

## CONCLUSION

The judgment below should be summarily affirmed.
Respectfully submitted.

CHARLES FRIED
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MAY 1986

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85-1067

No.

Supreme Court, U.S.
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# In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES OF AMERICA, PETITIONER

*v.*

BEN M. HOGAN COMPANY, INC.

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

CHARLES FRIED
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## QUESTION PRESENTED

Whether a jury instruction containing an erroneous presumption with respect to the interstate commerce element of a Sherman Act charge may constitute harmless error.

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# In the Supreme Court of the United States

OCTOBER TERM, 1985

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No.

UNITED STATES OF AMERICA, PETITIONER

*v.*

BEN M. HOGAN COMPANY, INC.

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

## OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-23a) is reported at 769 F.2d 1293.

## JURISDICTION

The judgment of the court of appeals was entered on July 25, 1985. A petition for rehearing was denied on September 20, 1985 (App., *infra*, 25a). On November 14, 1985, Justice Blackmun extended the time within which to file a petition for a writ of certiorari to and including December 19, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Arkansas, respondent Ben M. Hogan Co., Inc., was convicted of conspiring to fix bids in the award of Arkansas State Highway and Transportation Department (Highway Department) highway construction projects in central Arkansas, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Respondent was fined $800,000 on this count (App., *infra*, 1a). The court of appeals reversed.[1]

1. a. The government's proof of the bid-rigging conspiracy was presented largely through the testimony of the government's principal witness, Leonard Thompson, president of A.P.T. Construction Co. (A.P.T.) and one of the co-conspirators.[2] According to Thompson, William Moore, vice-president of respondent, approached him in May 1979 and asked that A.P.T. submit a complementary bid (*i.e.*, a higher bid than respondent's) on highway project 60173 (App., *infra*, 2a; Tr. (Thompson) 21).[3] In exchange for A.P.T.'s complementary bid, Moore promised to return the favor at a later date (App., *infra*, 2a). Thompson agreed to Moore's request and submitted a bid that was higher than respondent's (*id.* at 21a). Only respondent and A.P.T. submitted bids, and respondent was awarded the construction

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[1]Respondent was also convicted on three counts of mail fraud, in violation of 18 U.S.C. 1341, and was fined $1,000 on each count (App., *infra*, 1a). The court of appeals affirmed respondent's convictions on these counts (*id.* at 20a), and they are not involved in this petition.

[2]A.P.T. was charged in the same indictment and with the same offenses as respondent. As the result of a plea bargain agreement, A.P.T. entered a guilty plea to the Sherman Act count and to one mail fraud count prior to trial. App., *infra*, 2a n.1.

[3]The bidding process through which Arkansas state highway construction contracts are awarded is described in the court of appeals' opinion. App., *infra*, 2a n.2.

contract (App., *infra*, 2a; GX 1). In July 1980, Thompson asked Moore to submit a complementary bid on project 60179, and in September 1980 he again asked Moore to submit another complementary bid, this time on project 60234 (App., *infra*, 2a-3a; Tr. (Thompson) 28-29, 40-41).[4] In both instances, Moore agreed to, and did, submit complementary bids (*id.* at 29-30, 41).[5] A.P.T. was the low bidder on both projects and was awarded the construction work (App., *infra*, 3a; GX 4; Tr. (Thompson) 39, 46-47).

b. The government also presented evidence to prove that the co-conspirators' activities were in or affected interstate commerce. Specifically, the government proved that element of the offense in three separate ways. First, federal revenue sharing funds had been used to pay for the three highway projects described above (2 Tr. 134-140; GX 1, 4, 7). Second, A.P.T. had purchased heavy equipment used on the highway projects that was manufactured out-of-state and then shipped to Arkansas (2 Tr. 149-151; 3 Tr. 160-162; Tr. (Thompson) 13-14; GX 14, 15, 16, 17). And third, the projects involved work on highways that are part of the interstate highway system (1 Tr. 77-78; GX 19).

c. Respondent's defense at trial was that there was no agreement to rig the bids on the three highway construction projects (see App., *infra*, 3a-4a). Respondent conceded that Moore and Thompson had spoken about Highway Projects

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[4]Thompson's testimony was supported by respondent's bid work sheet for projects 60179 and 60234, which A.P.T. won. Both work sheets reflect handwritten changes in line item amounts — *i.e.*, figures were changed to increase bids for both projects (4 Tr. 288, 291; GX 21, 22).

[5]Thompson also made a similar arrangement with Jack Freshour, president of Freshour Construction Company, for project 60179 (App., *infra*, 3a).

60173 and 60234, but denied that they had conspired to rig bids. As defense counsel explained in his opening and closing statements to the jury, Moore solicited a complementary bid from Thompson for the sole purpose of having more than one bid submitted to the state Highway Department, which preferred to have more than one bid on a job (1 Tr. 28-29; 6 Tr. 449-450, 457-459; see App., *infra*, 2a n.2).

At no time during trial did respondent challenge the government's proof of the interstate commerce element of the Sherman Act charge. For instance, respondent's counsel did not claim in their opening and closing statements to the jury or in their motion for a new trial that the requisite effect on interstate commerce would not be or was not proved (1 Tr. 24-38; 6 Tr. 440-462; R. 223-25, 227-286). Although respondent briefly argued to the district court at two points that the government's allegation or proof of an effect on commerce was legally insufficient,[6] it did not present that argument to the jury as a basis for acquittal. In sum, the fact that the highway projects were in or affected interstate commerce was simply not a contested issue before the jury.

2. At the conclusion of the trial, the district court instructed the jury concerning the interstate commerce element of a Sherman Act violation. Among other things, the

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[6]Respondent filed a pretrial motion to dismiss the Sherman Act count of the indictment on the ground that it failed to allege the requisite effect on interstate commerce. The district court denied the motion in a written order, holding that the indictment's allegations were sufficient (R. 143-145). In support of its motion for a judgment of acquittal at the conclusion of the government's case, counsel argued in passing that the government had failed to prove "any effect on interstate trade and commerce" (3 Tr. 164). The district court denied the motion, stating that counsel could make his arguments to the jury (3 Tr. 168). As noted in the text, respondent's counsel elected not to contest the government's proof on the interstate commerce element and never mentioned the issue to the jury.

jury was instructed that the government was required to prove beyond a reasonable doubt "that the conspiracy * * * either affected interstate commerce or occurred within the flow of interstate commerce" and that "[t]he Sherman Act is not applicable unless it is first established that there is a restraint or attempted restraint of interstate commerce" (App., *infra*, 22a). After instructing the jury on the interstate commerce element of the offense, the court then instructed the jury concerning the type of conduct prohibited by the Sherman Act. Specifically, the court defined conduct that is a per se violation of the Sherman Act by giving the following standard jury instruction (App., *infra*, 4a-5a; 6 Tr. 492)[7]:

> Certain types of conduct are regarded as unreasonable per se. This means that the mere doing of the act itself constitutes an unreasonable restraint on interstate commerce, and it is not necessary to consider why the acts were committed, or their effect on the industry, or any other explanatory matters. Conduct regarded as unreasonable per se includes price fixing, division of markets and bid rigging.

Although respondent had not argued to the jury that the government's proof with respect to the interstate commerce element of the offense was insufficient, it objected to this instruction on the ground that it created an impermissible presumption of an effect on interstate commerce. The district court overruled respondent's objection (App., *infra*, 5a n.5).

3. A divided panel of the court of appeals reversed respondent's conviction on the Sherman Act count on the ground that the jury instructions contained an unlawful

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[7]See W. LaBuy, *Manual on Jury Instructions — Criminal* § 8.01-4, 36 F.R.D. 457 (1965).

conclusive presumption that the agreement to rig bids on the construction projects affected interstate commerce, in violation of *Sandstrom* v. *Montana*, 442 U.S. 510 (1979) (App., *infra*, 4a-8a). Although the jury had been separately and clearly instructed that the government was required to prove as an element of the offense, beyond a reasonable doubt, that the conspiracy was in or affected interstate commerce, the majority found that the challenged instruction "could have been understood by the jury to include an unconstitutional conclusive presumption of an effect on interstate commerce" (*id.* at 6a). Turning to the question whether the error was harmless, the panel majority observed (*id.* at 7a):

> If ever there could be a case where the giving of a jury instruction that included a conclusive presumption concerning an element of the crime amounted to harmless error, this would be the case, for in the record before us there appears to be ample evidence from which the jury could have found—and perhaps did find—that the element was proved.

However, the panel majority construed *Connecticut* v. *Johnson*, 460 U.S. 73 (1983) (plurality opinion), as requiring a new trial whenever a jury instruction includes a conclusive presumption on an element of the offense—even where, as in this case, the error would otherwise be harmless (App., *infra*, 7a).[8]

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[8]In a separate opinion, Judge McMillian concurred in the decision to reverse on the basis of the challenged instruction (App., *infra*, 20a). Judge Bright dissented (*id.* at 21a-23a). Emphasizing that the instructions must be read as a whole, Judge Bright noted that before the district court gave the per se instructions it had explained that, as one element of the offense, the conspiracy must be in or affect interstate commerce. The district court then had given the jury a detailed definition of interstate commerce (*id.* at 21a-22a). After giving these instructions, Judge Bright noted, the district court gave the challenged instruction,

## REASONS FOR GRANTING THE PETITION

This case presents an important, unsettled, and frequently recurring question concerning the application of the harmless error rule to a jury instruction containing a presumption with respect to an element of the offense. In *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), this Court held that an instruction containing an improper presumption concerning an essential element of the offense was unconstitutional.[9] However, *Sandstrom* did not address the question whether such an instruction could be harmless (442 U.S. at 526-527), and this Court has not finally resolved the issue. See *Francis* v. *Franklin*, No. 83-1590 (Apr. 29, 1985), slip op. 17; *Engle* v. *Koehler*, 466 U.S. 1 (1984) (equally-divided Court); compare *Connecticut* v. *Johnson*, 460 U.S. 73, 83-88 (1983) (plurality opinion), with *id.* at 94-99 (Powell, J., dissenting). The court of appeals' ruling in this case that an erroneous presumption always requires reversal of a conviction conflicts with the decisions of every other federal court of appeals and most state courts that have addressed the issue.[10] This case therefore clearly presents an issue warranting review by this Court.

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which "was merely part of the court's definition of an 'unreasonable restraint' " (*id.* at 22a). In Judge Bright's view, the "jury had to find that the defendant's business was in interstate commerce before it considered the per se instruction" (*id.* at 23a).

[9]In *Sandstrom*, the jury was instructed that "the law presumes that a person intends the ordinary consequences of his voluntary acts." 442 U.S. at 512. This instruction, the Court held, was unconstitutional because a reasonable juror could have interpreted it as either lowering the government's burden of proof or shifting the burden of proof to the accused on an element of the offense. *Id.* at 517-519.

[10]See generally Appendix to the Brief for the United States as Amicus Curiae, *Rose* v. *Clark*, cert. granted, No. 84-1974 (Oct. 7, 1985). We argued in our brief in *Clark* that an erroneous presumption does not automatically call for reversal. A copy of that brief has been provided to counsel for the respondent in this case.

However, we do not request plenary review at this time. The question presented here is whether a jury instruction containing an erroneous presumption on an element of the charged offense automatically requires reversal even where, as in this case, the defendant does not contest that element of the offense and it can be said beyond a reasonable doubt that the jury would have or did find the element without regard to the defective instruction. This issue is not materially different from the one that is already before the Court in *Rose* v. *Clark*, cert. granted, No. 84-1974 (Oct. 7, 1985), in which the jury instructions contained a rebuttable presumption of malice aforethought.

The court of appeals acknowledged that the error here was harmless and that reversal would not be warranted if a harmless error inquiry were permissible (App., *infra*, 7a). That conclusion is plainly correct. There was ample proof of the element involved in the challenged jury instruction, as the court of appeals stated (*ibid.*).[11] In fact, respondent did not argue to the jury that the government's proof of this element of the offense was insufficient; nor did it challenge the compelling character of the government's proof on

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[11]See, *e.g.*, *United States* v. *Young Brothers, Inc.*, 728 F.2d 682, 688-689 (5th Cir. 1984), cert. denied, No. 84-39 (Oct. 9, 1984); *United States* v. *Georgia Waste Disposal Systems, Inc.*, 731 F.2d 1580, 1583 (11th Cir. 1984); *United States* v. *Cargo Service Stations, Inc.*, 657 F.2d 676, 679-680 (5th Cir. 1981), cert. denied, 455 U.S. 1017 (1982); *United States* v. *Finis P. Ernest, Inc.*, 509 F.2d 1256, 1258-1261 (7th Cir.), cert. denied, 423 U.S. 874 (1975). The Court has often held that the power of Congress to regulate interstate commerce is extremely broad. See, *e.g.*, *Russell* v. *United States*, No. 84-435 (June 3, 1985); *McLain* v. *Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980); *Hospital Building Co.* v. *Rex Hospital Trustees*, 425 U.S. 738 (1976); *Perez* v. *United States*, 402 U.S. 146 (1971). Moreover, to the extent that this jurisdictional element of the offense simply establishes that Congress has power under the Commerce Clause to regulate the conduct in question and does not implicate the culpability of the accused, the concerns discussed in *Sandstrom* and *In re Winship*, 397 U.S. 358 (1970), upon which *Sandstrom* was based, have considerably less force.

appeal. Moreover, the instruction could not have prejudiced respondent's defense that Moore and Thompson did not conspire to rig the bids on the highway construction projects, because the instruction was irrelevant to that claim.

Beyond that, the jury instructions in this case plainly did not amount to a directed verdict on the interstate commerce element of the offense. The jury was expressly instructed that it was the sole judge of the facts (6 Tr. 470), that the government was required to prove every element of the charged offenses beyond a reasonable doubt (6 Tr. 475-476), and that the question whether the alleged conspiracy was in or affected interstate commerce was for it to decide (6 Tr. 484, 491-492). At no time was the jury told that it was compelled to find that the alleged conspiracy was in or affected interstate commerce, that the government had proven this element of the offense, or that the issue was not for its consideration. In fact, as Judge Bright pointed out in his dissent (App., *infra*, 21a-22a; see 6 Tr. 484, 491-492), the district court expressly told the jury that one of the "[t]hree elements * * * required to be proved beyond a reasonable doubt in order to establish the offense of conspiracy charged in the indictment" was "that the conspiracy * * * either affected interstate commerce or occurred within the flow of interstate commerce."

The only reason given by the court of appeals for refusing to affirm respondent's Sherman Act conviction was that the plurality opinion in *Connecticut* v. *Johnson* requires reversal in every case in which an erroneous presumption is contained in the jury charge. However, that is the issue presently before the Court in *Clark*. We therefore request that the Court hold the petition in this case pending its decision in *Clark* and dispose of this case as appropriate in light of the Court's decision in that case.

## CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the Court's disposition of *Rose* v. *Clark*, cert. granted, No. 84-1974 (Oct. 7, 1985).

Respectfully submitted.

CHARLES FRIED
*Solicitor General*

DECEMBER 1985

# APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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No. 84-1757

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UNITED STATES OF AMERICA, APPELLEE,

v.

BEN M. HOGAN CO., INC., APPELLANT.

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*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS*

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Submitted: November 12, 1984

Filed: July 25, 1985

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Before BRIGHT, Senior Circuit Judge, McMILLIAN and BOWMAN, Circuit Judges.

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BOWMAN, Circuit Judge.

Defendant Ben M. Hogan Company, Inc. (Hogan), a corporation engaged in the business of highway construction, was indicted by a grand jury on one count of conspiring to restrain trade in violation of the Sherman Act, 15 U.S.C. § 1, and on three associated counts of mail fraud under 18 U.S.C. § 1341. Hogan was found guilty on all counts charged in the indictment. The District Court fined Hogan $800,000 on the Sherman Act count (Count One) and $1,000 each on the mail fraud counts (Counts Two through Four). Hogan appealed. We reverse Hogan's conviction on Count One and remand this case to the District Court for a new trial on Count One. We affirm Hogan's convictions on Counts Two through Four.

The theory upon which Hogan was prosecuted was, in essence, that between May 1979 and September 1980, Hogan conspired with A.P.T. Construction Company, Inc. (A.P.T.)[1] to allocate between themselves, through the submission of rigged bids, work contracts for certain state highway construction projects.[2] The government's principal witness, Leonard Thompson, president of A.P.T., testified that at the request of William Moore, vice president of Hogan, he agreed in May 1979 to submit a complementary bid, *i.e.*, a higher bid than the bid Hogan planned to submit, on project 60173. Two bids were submitted on project 60173, one from Hogan and one from A.P.T. Hogan's bid was the lower and Hogan was awarded the contract. According to Thompson, in exchange for A.P.T.'s complementary bid on project 60173, Moore promised to return the favor in the future.

Thompson testified that in July 1980, he telephoned Moore with a request that Hogan bid in excess of the amount A.P.T. planned to bid on project 60179, and that

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[1] A.P.T. was charged in the same indictment with the same offenses as was Hogan. Prior to trial, A.P.T. pleaded guilty to Counts One and Two and agreed to cooperate with the government in its investigation. In return, the government agreed to dismiss Counts Three and Four, to recommend that A.P.T. be fined $150,000, and not to prosecute A.P.T. further for any prior act of bid rigging.

[2] State highway projects are authorized by a highway commission and specifications for the projects are drawn by the Arkansas State Highway and Transportation Department. A public bidding process is employed in awarding contracts for the work to be done on these projects: a public announcement of a project for which a contract is to be awarded is made; a bid proposal form is requested by interested contractors; a list of contractors that have requested a proposal form is made public; completed proposal forms, which include a statement to be signed by the bidder that the proposal is made without collusion, are submitted; and a public bid letting is held. Thereafter, the contract generally is awarded to the lowest bidder. The state encourages competitive bidding and prefers not to award a contract on the basis of a single bid.

Moore agreed to do so. Thompson also testified that he was able to make a similar arrangement regarding project 60179 with Jack Freshour, president of Freshour Construction Company (Freshour Construction).[3] A.P.T., Hogan, and Freshour Construction bid on project 60179. The contract on project 60179 was awarded to A.P.T., which proved to be the low bidder.

Thompson further testifed that in September 1980, he telephone Moore with a request that Hogan bid in excess of the bid A.P.T. planned to submit on project 60234 and that Moore agreed to do so. Thompson testified that when he made the same request of Freshour, Freshour told him that Freshour Construction did not intend to bid on project 60234. Hogan and A.P.T. were the only bidders on project 60234. A.P.T. was the low bidder and was awarded the contract on project 60234.

Thompson's testimony was contradicted by several witnesses. Moore acknowledged that he had had conversations with Thompson concerning projects 60173 and 60234 but denied entering into any agreements with Thompson to rig bids. Freshour testified that he never discussed making complementary bids with Thompson or anyone else. Freshour's wife testified that she had never encountered Thompson, while Thompson's testimony suggests that she had been present on one occasion when he claims to have met with Freshour at the Freshour residence.

Hogan's bid estimator and its asphalt plant superintendent testified that they never had been instructed to keep a bid above any particular amount, and that, in fact, they had standing instructions to update bids with price reductions if a downward price fluctuation during the pendency of a bid made it feasible to do so. Freshour Construction's

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[3] There is no indication in the record of any proceedings against Freshour construction.

bid estimator testified that he cut the profit margin on his company's bid on project 60179 in an effort to secure the contract.

Others eligible to bid on the projects in question testified that they were not contacted regarding the bidding on the projects alleged by Thompson to have been rigged. Thompson, however, testified that it was unnecessary to contact other bid proposal holders because their plants were located so far from the project sites that it would have been impossible from the standpoint of transportation costs for them to have underbid.

For reversal, Hogan argues that the District Court improperly instructed the jury regarding the interstate commerce element of the Sherman Act violation charged in Count One of the indictment. We agree, and we therefore reverse Hogan's conviction on Count One and remand this case to the District Court for a new trial on Count One.[4]

Hogan also makes a number of other claims, all of which we have carefully considered and have found to be without merit. We will, however, discuss Hogan's additional claims to the extent that they are not resolved by our reversal for instructional error on Count One.

I.

The District Court correctly characterized this case as one concerning acts which, if proved, are deemed per se unreasonable under the Sherman Act. Having done so, the court instructed the jury that:

> Certain types of conduct are regarded as unreasonable per se. This means that the mere doing

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[4] While an effect on interstate commerce is an element of the Sherman Act violation charged in Count One, it is not an element of the mail fraud violations charged in Counts Two through Four. Therefore the instructional error regarding interstate commerce did not prejudice Hogan with respect to Counts Two through Four, on which the District Court gave separate instructions.

> of the act itself constitutes an unreasonable restraint on *interstate* commerce, and it is not necessary to consider why the acts were committed, or their effect on the industry, or any other explanatory matter. Conduct regarded as unreasonable per se includes price fixing, division of markets and bid rigging.

Trial Transcript (Tr.) at 492 [hereinafter referred to as per se instruction] (emphasis added).[5] Hogan argues (1) that the per se instruction informed the jury that if it found Hogan's actions constituted bid rigging, it could convict Hogan without considering whether the government had proved that Hogan's actions had an effect on interstate commerce; (2) that the per se instruction created a conclusive presumption of an effect on interstate commerce; and (3) that the government thereby was unconstitutionally relieved of its burden of proving every element of its Sherman Act case.

"A conclusive presumption removes the presumed element from the case once the [government] has proven the predicate facts giving rise to the presumption." *Francis v. Franklin*, 105 S. Ct. 1965, 1971 n.2 (1985). The Supreme Court has found conclusive presumptions in criminal in-

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[5] Hogan made a timely, specific objection to the instruction here at issue. The District Court denied the objection.

> [COUNSEL]: I object [to the government's per se instruction] on the grounds that it violates Sandstrom v. Montana in two respects. One is that the jury is instructed to presume that interstate commerce can be found from the mere doing of an act, which takes the interstate commerce issue away from the jury. That issue, Your Honor, has never been raised before. There are no cases on it. But I think there is a serious Sandstrom problem in taking—it would essentially relieve the government from its obligation of proving interstate commerce from the mere doing of an act. And I think there is a real problem with that instruction in that regard.
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> THE COURT: All right. That will be denied.

Tr. at 394.

structions to " 'conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime,' and [to] 'invade [the] factfinding function' which in a criminal case the law assigns solely to the jury." *Sandstrom v. Montana*, 442 U.S. 510, 523 (1979) (quoting *Morissette v. United States*, 342 U.S. 246, 275 (1952) and *United States v. United States Gypsum Co.*, 438 U.S. 422, 446 (1978)).

We have examined the per se instruction and we conclude that it could have been understood by the jury to include an unconstitutional conclusive presumption of an effect on interstate commerce. We are convinced that the District Court did not intend to create such a situation; immediately prior to giving its per se instruction, the District Court gave a correct instruction on the interstate commerce element and on the government's burden of proof regarding that element. The per se instruction, however, contradicts the court's careful instruction on interstate commerce as a separate element of the Sherman Act offense. "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instuctions the jurors applied in reaching [a] verdict." 105 S. Ct. at 1975.[6]

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[6] Contrary to the implication left by the dissent, nowhere in the District Court's instructions was the jury told it *had* to find that Hogan's business affected interstate commerce *before* it considered the per se instruction. If the instructions truly had required such a course of action, we would agree that Hogan's conviction on Count One could be affirmed. In actuality, however, the detailed instructions pertaining to an effect on interstate commerce were followed immediately by the per se instruction, which told the jury that the mere doing of the act, *i.e.*, bid rigging, by itself constituted an unreasonable restraint on *interstate* commerce. The District Court gave no indication whatsoever that the issues addressed in the per se instruction were separable from those addressed in the immediately preceding sentences. *See* Tr. at 491-92. We do not wish any more than the dissent to see a convicted criminal "escape[ ] just punishment." *Infra* at 21.

If ever there could be a case where the giving of a jury instruction that included a conclusive presumption concerning an element of a crime amounted to harmless error, this would be the case, for in the record before us there appears to be ample evidence from which the jury could have found—and perhaps did find—that element was proved. But where "[t]he conclusive presumption the jury was instructed to apply permit[s] the jury to convict [the defendant] without ever examining the evidence concerning an element of the crime[ ] charged," a plurality of the Supreme Court has held that "[s]uch an error deprive[s the defendant] of 'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.' " *Connecticut v. Johnson*, 460 U.S. 73, 87-88 (1983) (quoting *Chapman v. California*, 386 U.S. 18, 23 (1967). While the *Connecticut v. Johnson* plurality did not hold that "instructional error of constitutional dimensions may never be harmless," it did counsel that not every "form of instructional error should be analyzed for harmlessness." *Id.* at 83. Though the substantive issue of the flawed instruction in *Connecticut v. Johnson* was the critical issue of criminal intent, rather than the issue of an interstate effect on commerce, the form of the instruction clearly was that of a conclusive presumption. And the plurality's summary of its holding, *see id.* at 87-88, indicates that it was the conclusive form of the instruction, more than the particular element of the crime to which the instruction pertained, that was of concern to the plurality.

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But convictions must be achieved in a just fashion. When instructions are given that, read as a whole, reasonably can be understood to contain a conclusive presumption concerning an element of the crime charged, the possibility exists that a jury could return a guilty verdict without first finding that every element of the crime has been proved beyond a reasonable doubt. Instructions that create such a possibility make it impossible for a reviewing court to conclude that the defendant has been convicted in a manner that satisfies due process.

Accordingly, we hold that by including the word "interstate before the word "commerce" in its per se instruction, the District Court committed reversible error.[7] We therefore reverse Hogan's conviction on Count One, the only count to which the per se instruction related, and remand this case for a new trial on Count One.

II.

Hogan claims that it is entitled to reversal of its convictions on all counts of the indictment due to the government's failure to make available to it in a timely fashion certain notes taken by government attorneys during pretrial interviews of Thompson, Moore, and Mrs. Freshour. We disagree.

The Freshour notes were disclosed to Hogan during trial. On appeal, this Court reviewed *in camera* the Thompson and Moore notes and ordered them disclosed to Hogan in their entirety, with directions that Hogan file a supplemental brief to explain further its position regarding the interview notes. Having considered Hogan's arguments concerning the notes, we hold that Hogan was not prejudiced by their previous unavailability.

A.

The Supreme Court held in *Brady v. Maryland*, 373 U.S. 83 (1983), that "suppression by the prosecution of evidence favorable to an accused upon request violates due

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[7] In giving its per se instruction, we believe the District Court's wisest course of action would have been to use the word "trade" in place of the words "interstate commerce." *See generally* E. Devitt and C. Blackmar, *Federal Jury Practice and Instructions* § 55.15 (3d ed. 1977), although if the District Court had omitted the word "interstate" at the particular place in the per se instruction where it appears, Hogan's claim would be, in our view, without substance. *Cf. United States v. Koppers Company* 652 F.2d 290, 293 (2nd Cir.), *cert. denied*, 454 U.S. 1083 (1981).

process where the evidence is material either to guilt or to punishment." *Id.* at 87. In *Brady*, the prosecutor had failed to disclose exculpatory evidence. Hogan makes no plausible claim that the interview notes contain exculpatory material.[8] Rather, Hogan claims that the Thompson and Freshour notes were valuable to its defense for the purpose of impeaching the credibility of Thompson, the government's principal witness. As a recent Supreme Court case explicitly recognizes, however, impeachment evidence can be "favorable to an accused"; "[i]mpeachment evidence, . . . as well as exculpatory evidence, falls within the *Brady* rule." *United States v. Bagley*, 53 U.S.L.W. 5084, 5086 (U.S. July 2, 1985). Accordingly, if either exculpatory or impeachment evidence is suppressed by the prosecution, and if the evidence is material, reversal is warranted.

In cases decided by this Court prior to the Supreme Court's decision in *United States v. Bagley*,

> [w]hether evidence [was] sufficiently material to require its disclosure . . . [was] determined by initially considering whether the defense made a 'specific' or merely a 'general' request for its disclosure prior to trial. If a specific request was made, evidence [was] deemed material, and a reversal warranted, if disclosure of the evidence 'might have affected the outcome of the trial.' If only a general request was made, evidence [was] considered material only if it 'created a reasonable doubt that did not otherwise exist [when] evaluated in the context of the entire record.'

*Scurr v. Niccum*, 620 F.2d 186, 189 (8th Cir. 1980) (quoting *United States v. Agurs*, 427 U.S. 97, 104, 112 (1976)). A majority of the Supreme Court now seems to agree that irrespective of the specificity of a request for evidence made by the defense, for purposes of a *Brady*

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[8] We reject an attempt by Hogan to characterize the interview notes as potentially exculpatory merely because they do not contain the exact inculpatory phraseology Hogan thought they might.

inquiry such "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." [9] 53 U.S.L.W. at 5088.

We have carefully considered Hogan's claims that it could have used the Thompson and Freshour interview notes to impeach Thompson's credibility at trial and find that Hogan is not entitled to relief under the aegis of *Brady*. There is not a reasonable probability that the result of Hogan's trial would have been different had the notes been disclosed. The government's failure to produce these notes does not "undermine confidence in the outcome of [Hogan's] trial." [10] *Id.* at 5087.

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[9] This "reasonable probability" standard of materiality is taken from Part III of Justice Blackmun's opinion in *United States v. Bagley*. Only Justice O'Connor joined in Part III of Justice Blackmun's opinion. Justice White, however, in a concurring opinion joined by the Chief Justice and Justice Rehnquist, approvingly quoted the "reasonable probability" standard of materiality found in Part III of Justice Blackmun's opinion. Justice Blackmun finds this standard "sufficiently flexible to cover the 'no request,' 'general request,' and 'specific request' cases of prosecutorial failure to disclose evidence favorable to the accused," but he additionally addresses how reviewing courts should consider the specificity of the defense's request for evidence in making determinations of materiality under the "reasonable probability" standard. 53 U.S.L.W. at 5088. Justice White agrees that the standard " is 'sufficiently flexible' to cover all instances of prosecutorial failure to disclose such evidence," but "see[s] no reason to attempt to elaborate on the relevance to the [materiality] inquiry of the specificity of the defense's request for disclosure . . . ." *Id.*

[10] Hogan similarly claims that it is entitled to relief under *Brady* because the Moore interview notes could have been used to rehabilitate Moore's trial testimony. This argument is meritless. The government did not attempt to impeach Moore's testimony regarding the issue on which Hogan claims the notes could have been used for rehabilitation. Absent impeachment, there is no basis for rehabilitation. Moreover, even assuming that material such as the Moore notes could be deemed favorable to the accused under *Brady*, it is hard to imagine a situation where evidence claimed to be of value to the defense solely for the purpose of bolstering a witness's favorable, unimpeached testimony will satisfy the "reasonable probability" standard of materiality. In any event, in this case the Moore notes do not satisfy that standard.

B.

Under the Jencks Act, 18 U.S.C. § 3500, when a witness testifies for the government in a criminal prosecution, the government may, upon request by the defendant and following the witness's direct testimony, be required to produce any statement of the witness which relates to the witness's trial testimony. Hogan made a pretrial request for, and the government voluntarily agreed to produce five days prior to trial, any Jencks Act material in the government's possession. On appeal, Hogan raises a Jencks Act claim. Because this claim seems to be focused upon the Thompson notes, we will discuss it in the context of those notes.

The government apparently concluded that the Thompson notes were not Jencks Act materials and did not produce them in advance of trial. When Hogan became aware of the Thompson notes at trial, it moved for their production. The District Court reviewed the Thompson notes *in camera*, and pursuant to the Jencks Act, ordered extrapolated from the notes and disclosed to Hogan scattered sentences and phrases within the notes that were enclosed in quotation marks. Hogan in fact did not receive this material until after both sides has rested in the presentation of their cases. Hogan now argues that it was prejudiced by the government's failure to make timely disclosure of Jencks Act material.

"Although in many cases the government freely discloses Jencks Act material to the defense in advance of trial, the government may not be required to do so." *United States v. White* 750 F.2d 726, 729 (8th Cir. 1984). But when disclosure is ultimately required, it must be made before it is too late for the material to be put to any effective use. We need not address the timeliness of the disclosure in this case because the Thompson notes in their entirety do not as a matter of law constitute Jencks

Act material and because Hogan waived any claim it may have had regarding those portions of the Thompson notes ordered disclosed by the District Court.

The Jencks Act, in relevant part, defines a statement as "a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by [a] witness and recorded contemporaneously with the making of such oral statement." 18 U.S.C. § 3500(e)(2).

Plainly, the Thompson notes when viewed in their entirety do not constitute Jencks Act materials because they are not statements within the meaning of the Jencks Act. *See United States v. Cuesta,* 597 F.2d 903 (5th Cir.), *cert. denied*, 444 U.S. 964 (1979) (investigators' notes of interviews do not fall under the Jencks Act even if they contain occasional verbatim recitations of phrases of interviewee). As recognized by Justice Powell, "the fact that counsel usually will take notes does not mean that the notes often will be 'statements.' Counsel rarely take down verbatim what witnesses say in these preparatory conferences. Consequently, prosecutors' notes may be expected to meet the requirements of [18 U.S.C. § 3500(e)(2)] very infrequently." *Goldberg v. United States*, 425 U.S. 94, 122 n.9 (1976) (Powell, J., concurring in judgment).[11]

While the District Court did not find that the Thompson notes in their entirety constituted Jencks Act material, it did direct, pursuant to the Jencks Act, that several sentences and phrases enclosed in quotation marks be extracted and given to Hogan. Certainly the District Court was not required to order disclosed as Jencks Act material a few scattered sentences and phrases it found in a body of otherwise non-Jencks Act, attorneys' rough interview notes. In fact, we believe that a trial court ought not

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[11] Likewise, the Moore and Freshour notes in their entirety do not constitute Jencks Act materials and Hogan therefore has no viable Jencks Act claim with respect to them.

employ such a process of extrapolation unless the particular circumstances of a case are extremely compelling. In our view, it is doubtful that the circumstances of this case can fairly be characterized as compelling.[12] We decline, however, to determine whether or not the District Court erred in ordering portions of the Thompson notes disclosed. *Cf. Campbell v. United States*, 373 U.S. 487, 493 (1963) (determination by district court of producibility under the Jencks Act may not be disturbed unless clearly erroneous). Regardless of the propriety of the District Court's actions, Hogan waived any Jencks Act claim it may have had regarding the Thompson note extrapolations.

The District Court first ordered the government to disclose portions of the Thompson notes at 1:30 p.m. on May 7, 1984 during an in-chambers conference with counsel.[13] *See* Tr. at 251. On the morning of May 8, 1984, Hogan rested its case, in spite of the fact and without mentioning to the court that it had not received the material the court ordered disclosed to it on May 7. During the instruction conference, on the afternoon of May 8, 1984, Hogan then complained that it had not received the material. The District Court ruled that Hogan had waived its right to this material by its failure to alert the court to the matter prior to resting its case. The court reasoned that it had no way of knowing that the government had not complied with the court's order and that instead of voluntarily resting its case, Hogan should have requested some time to receive and review the material in order to make a

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[12] The District Court acknowledged that it acted as it did "out of an abundance of caution" and that it might have "stretch[ed] it a little far" by giving Hogan any portion of the Thompson notes. Tr. at 251, 252.

[13] The written order was dated May 7, 1984 and was filed with the court clerk on May 8, 1984.

determination as to whether it wished to present additional evidence. *See* Tr. at 410-11. We hold that the District Court correctly found Hogan's actions to constitute a waiver.

C.

Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure requires the government, upon request of a defendant, to disclose relevant written or recorded statements of the defendant, as well as the substance of any oral statement made by the defendant in response to interrogation by any person then known by the defendant to be a government agent, which the government intends to offer in evidence at trial. Hogan made a broadly-phrased, pretrial request for production under Rule 16(a)(1)(A). Also prior to trial, Hogan protested to the court that counsel for Moore had informed Hogan that the government possessed notes taken by government attorneys at the time they interviewed Moore and requested that the court order the Moore notes produced. The District Court never explicitly granted or denied this request, but ruled that the discovery proposal of the government, which did not include production of the Moore notes, was acceptable. Hogan now claims that it should have been provided with the Moore notes pursuant to Rule 16(a)(1)(A).

Assuming *arguendo* that the Moore notes should have been disclosed to Hogan under Rule 16(a)(1)(A), we hold that the nondisclosure of these notes is not a ground for reversal because Hogan's substantial rights were not thereby prejudiced. *See United States v. Bledsoe*, 674 F.2d 647, 670 (8th Cir.), *cert. denied*, 459 U.S. 1040 (1982). As we already have concluded, it is not reasonably probable that the result of the trial would have been different had the Moore notes been disclosed.

**III.**

Hogan claims there was a substantial variance between the single conspiracy charged in the indictment, as voluntarily clarified prior to trial by the government, and the proof at trial. We reject this claim.

The indictment charged Hogan with a single conspiracy to rig bids on an unspecified number of highway projects in central Arkansas. Although a formal bill of particulars was never ordered, the government filed a voluntary disclosure two months before trial, specifying three projects on which Hogan was believed to have participated in bid rigging and defined "central Arkansas" as Pulaski County and its adjacent counties. The voluntary disclosure also referred to two to four other unspecified projects on which bids purportedly were rigged with Hogan's cooperation. Hogan contends that it thus was charged with a massive conspiracy to rig five to seven bids on projects in a multi-county area, while the proof adduced at trial related to only three bids on projects in a single county.[14]

Clearly Hogan, was, on the basis of the indictment and the government's voluntary disclosure, notified well in advance of trial that it was charged with rigging bids on the three Pulaski County projects to which the proof at trial

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[14] Hogan makes a related argument that the proof established separate bid rigging conspiracies, rather than the single conspiracy with which Hogan was charged. There is, however, substantial evidence in the record from which a jury reasonably could find a single, overall conspiracy concerning projects 60173, 60179, and 60234. Such a conclusion is not undermined by the fact that there was evidence of multiple sub-conspiracies, *i.e.*, of the agreements made at the time of each of the three bid lettings, constituting objects of the overall conspiracy. *See Koolish v. United States*, 340 F.2d 513, 525 (8th Cir.), *cert. denied*, 381 U.S. 951 (1965). And, contrary to Hogan's assertions, a single conspiracy is not transformed into multiple ones merely by the lapse of time. *United States v. Vila*, 599 F.2d 21, 24 (2nd Cir.), *cert. denied*, 444 U.S. 837 (1979).

related, and Hogan had every opportunity to plead to and defend against those charges. The indictment charged Hogan with conspiring to rig bids in violation of the Sherman Act; that charge was not changed by the government's voluntary disclosure and, subject to the interstate commerce problem discussed in Part I of this opinion, was proved at trial. The violation shown was merely narrower than the violation charged. Under these circumstances, Hogan was not prejudiced. *See United States v. Miller*, 105 S. Ct. 1811, 1814-16 (1985).[15]

Hogan claims that it was prejudiced by the introduction at trial of A.P.T.'s guilty plea. *See supra* note 2. Government counsel informed the District Court that it anticipated use by defense counsel of A.P.T.'s guilty plea to impeach Thompson's credibility and proposed that it first be allowed to bring to the jury's attention the matter of

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[15] We also are unpersuaded by Hogan's alternative claim that it was prejudiced by Thompson's explanation of Freshour's willingness to submit a complementary bid on project 60179; Thompson testified that because he had agreed, at Freshour's request, to submit complementary bids on two projects in April 1979, Freshour was willing to do so on project 60179. Hogan argues that reference to these April 1979 projects fixes commencement of the conspiracy at a point preceding Hogan's involvement in May 1979 and thus, that the proof at trial was of a conspiracy broader than that charged. Thompson's explanation first was elicited by Hogan on cross-examination and was consistent with Thompson's grand jury testimony, a copy of which had been provided to Hogan in advance of trial. Hogan cannot seriously claim prejudice on the basis of an answer to a question which it asked solely to challenge Thompson's credibility and which exceeded the scope of direct examination, especially when Hogan, based on the availability of Thompson's grand jury testimony, must have known what answer Thompson likely would give. Furthermore, any evidence of a conspiracy in April 1979 would have no bearing whatsoever upon Hogan; Thompson did not implicate Hogan with respect to the April 1979 projects, he spoke only of an agreement between A.P.T. and Freshour Construction. Therefore, Hogan was not required at trial to defend against any charge that it had not been informed of by the indictment.

A.P.T.'s guilty plea. Tr. at 112, 147-49. Defense counsel objected generally to this course of action, Tr. at 114, but in no way denied that counsel intended to use the guilty plea to attack Thompson's credibility. The District Court ruled that government counsel would be permitted to introduce the fact of A.P.T.'s guilty plea during its direct examination of Thompson.

The following cautionary instruction was given before Thompson testified concerning the guilty plea:

> [E]vidence of a witness's own guilty plea, that is, Mr. Thompson for A.P.T. Company, cannot be used except to assess the credibility of the witness and also as an acknowledgment of the witness's participation in the offense charged, but it cannot be considered as substantive evidence of the defendant Ben Hogan Company's guilt, and no inference of guilt as to the Ben Hogan Company can be inferred from A.P.T.'s plea.

Thompson Transcript at 3. Government counsel then questioned Thompson briefly to establish the fact that A.P.T. had pleaded guilty. On cross-examination, in an obvious attempt to impeach Thompson's credibility, counsel for Hogan questioned Thompson extensively about A.P.T.'s guilty plea. *Id.* at 51-54. In its formal charge to the jury, the District Court again explicitly cautioned the jury that evidence of A.P.T.'s guilty plea could be used only in assessing Thompson's credibility and not in determining Hogan's guilt or innocence. *See* Tr. at 472-73.

> Evidence that [a co-defendant] entered a plea of guilty to the same offense is not error unless it is elicited as substantive proof of the defendant's guilt. Where it is introduced for other purposes, such as to

> impeach, to reflect on a witness' credibility, or to show the witness' acknowledgment of participation in the offense, evidence of a co-defendant's guilty plea is clearly admissible. In such circumstances, the trial judge should instruct the jury that the evidence is received for this purpose alone and that the plea cannot form the basis of any inference as to the guilt of the defendant.

*United States v. Wiesle,* 542 F.2d 61, 62 (8th Cir. 1976); *cf. Wallace v. Lockhart,* 701 F.2d 719, 725-26 (8th Cir.), *cert. denied,* 104 S.Ct. 340 (1983) (relying on *United States v. Wiesle*) (co-defendant's prior conviction introduced to show acknowledgment of participation in the crime); *United States v. Basic Construction Company,* 711 F.2d 570, 574 (4th Cir.), *cert. denied,* 104 S. Ct. 371, 527 (1983) (given the court's cautionary instruction, no error for court to tell jury of co-defendants' nolo contendere pleas although it is better to simply tell jury that cases of co-defendants had been disposed of without saying how).

We find the introduction of the guilty plea in this case to have been in keeping with *United States v. Wiesle* and thus within the District Court's discretion. The jury's use of the plea was carefully limited by the District Court to assessment of Thompson's credibility and to A.P.T.'s acknowledgment that Thompson participated in the offense charged. We need not hold the introduction of the plea improper merely because it first was injected into the case by the government on direct examination of Thompson. *Cf. United States v. Koppers Company,* 652 F.2d 290, 299 (2nd Cir.), *cert. denied,* 454 U.S. 1083 (1981) (references to report which revealed that government's principal witnesses had perjured themselves in early phases of investigation of rigged road construction bids were properly elicited by government on direct examination to anticipate attempts by defense counsel to attack witnesses' credibility). Hogan's claim of prejudice is further eroded

by the fact that Hogan's counsel made extensive use of the plea on cross-examination in an attempt to impeach Thompson's testimony. *Cf. id.; United States v. Schmaltz,* 562 F.2d 558, 560 (8th Cir.), *cert. denied,* 434 U.S. 957 (1977) (where co-defendant pleaded guilty after jury was impaneled and court, without giving a cautionary instruction, informed jury that co-defendant's case had been resolved, defendant suffered no substantial prejudice, especially since defense counsel called co-defendant to the stand and extensively examined him regarding the guilty plea).

V.

Hogan makes additional challenges to the jury instructions given by the District Court, as well as to the District Court's refusal to give two particular instructions proposed by Hogan. We have examined the charge to the jury as a whole and find that Hogan's remaining challenges to the court's instructions are meritless. We also find that the District Court did not abuse its discretion in refusing to instruct the jury as requested by Hogan. Similarly, we reject Hogan's claims of error regarding various other discovery and evidentiary matters. Our review discloses that these matters were entirely within the District Court's soundly exercised discretion.

VI.

Finally, Hogan claims that government counsel improperly injected government counsel's credibility into the trial and misstated the evidence. We have considered these claims and find them to be without merit. However, we caution government counsel on retrial to avoid making statements that could be construed as an injection into the trial of government counsel's credibility or statements of the evidence that are not faithfully accurate. While we do

not wish to discourage spirited advocacy, prosecutorial misconduct is a serious matter, and this Court will not allow actual instances of such misconduct to go unremedied.

**VIII.**

With respect to Hogan's conviction on Count One, the judgment of the District Court is reversed and this case is remanded to the District Court for a new trial. With respect to Hogan's convictions on Counts Two through Four, the judgment of the District Count is affirmed.

McMILLIAN, Circuit Judge, concurring.

I concur in the decision to reverse and remand for new trial appellant's conviction for conspiracy to restrain trade in violation of the Sherman Act (count 1) by submitting rigged bids for certain state highway construction projects. I agree that the instruction describing the types of conduct considered unreasonable per se under the Sherman Act contained a conclusive presumption of an effect on interstate commerce which improperly removed that element of the offense from the consideration of the jury. *See* Part I *supra*. I also concur in the analysis in Parts II (government nondisclosure of exculpatory material and statements of the defendant), III (variance), V (instructions and other discovery and evidentiary matters), and VI (prosecutorial misconduct).

With respect to Part IV, I acknowledge that the analysis therein of the anticipatory introduction of APT's guilty plea is consistent with the position set forth for this Circuit in *United States v. Wiesle*, 542 F.2d 61, 62 (8th Cir. 1976). I write separately only to restate my belief that the better rule is to not "allow the government to introduce evidence as part of its case-in-chief that a codefendant had pleaded

guilty to the same or similar offense with which the defendant is charged." *United States v. Hutchings*, 751 F.2d 230, 239 (8th Cir. 1984) (McMillian, J., specially concurring).

Finally, I note that although the conspiracy to restrain trade count, for which conviction the district court had imposed a substantial fine in the amount of $800,000, has been reversed and remanded for new trial, the court has today affirmed appellant's conviction for three counts of mail fraud in connection with the state highway construction bid-rigging scheme. The district court imposed a fine of $1,000 on each of the mail fraud counts. This is the maximum fine that the district court could have imposed for the offense of mail fraud. *See* 18 U.S.C. § 1341. Mail fraud may also be punished by imprisonment for not more than five years. It is, of course, impossible to imprison the corporation itself; it would not, however, be impossible to imprison, following investigation, indictment, trial, and conviction, those corporate officers or employees who acted unlawfully on behalf of the corporation. We have often observed that a corporation cannot take action itself but must act through persons. In my view, it is time to reexamine the prosecution and punishment of corporate crime and to focus upon not only the wrongdoing of the corporate entity but also upon that of its human actors.

BRIGHT, Senior Circuit Judge, dissenting.

After a lengthy trial, a corporation found guilty of bid rigging escapes just punishment on grounds that the trial court erred in instructing the jury. I must dissent. A reading of the instructions as a whole discloses no error at all, for the experienced and able trial judge fully explained the interstate commerce element necessary to convict.

1) The recitations of the indictment indicated the necessity for proof of conduct restraining interstate commerce. The trial court instructed, with regard to the indictment:

> In Count One the defendants are charged with having engaged, from sometime in or about May, 1979 to about September, 1980 in a combination and conspiracy in unreasonable restraint of certain interstate trade and commerce * * *.

2) The court explicitly stated that, as one element of the offense charged, the conspiracy must affect interstate commerce:

> Three elements are required to be proved beyond a reasonable doubt in order to establish the offense of conspiracy charged in the indictment.
>
> * * * *
>
> Third, that the conspiracy * * * either affected interstate commerce or occurred within the flow of interstate commerce.

3) Finally, the court gave the jury a detailed definition of "interstate commerce":

> The Sherman Act is not applicable unless it is first established that there is a restraint or attempted restraint of interstate commerce. Before you can find the defendant guilty, you must find beyond a reasonable doubt that there was such an actual or attempted restraint. You may so find when the allegedly illegal conduct, as charged in the indictment, has a direct impact on goods moving in interstate commerce—which means across state lines—or on goods which are in the flow of commerce—as when the goods are in the state of origin awaiting interstate shipment or in the state of destination on the way to the final consumer.

After giving the above instructions, the court gave the instruction challenged here. The instruction in question was merely part of the court's definition of an "unreasonable" restraint:

> To restrain interstate commerce means to interfere *unreasonably* with the ordinary, usual and freely competitive pricing or distribution system of the open market in interstate trade [sic] and commerce.
>
> * * * *
>
> The government's burden is satisfied by a showing that the defendant's business activities substantially affected interstate commerce.
>
> Certain types of conduct are regarded as unreasonable per se. This means that the mere doing of the act itself constitutes an unreasonable restraint on interstate commerce, and it is not necessary to consider why the acts were committed, or their effect on the industry, or any other explanatory matter. Conduct regarded as unreasonable per se includes price fixing, division of markets and bid rigging.

(Emphasis added).

We must consider the instructions as a whole, not in isolation, in determing whether a trial court erred. *United States v. Park*, 421 U.S. 658, 674-75 (1975); *Cupp v. Naughton*, 414 U.S. 141, 146-47 (1973); *Aimor Electric Works, Ltd. v. Omaha National Bank*, 727 F.2d 688, 691 (8th Cir. 1984). Here, reading the instructions as a whole demonstrates their propriety. The trial court explained first that the Sherman Act did not apply without a restraint or attempt to restrain *interstate* commerce. The court then explained that the restraint had to be unreasonable, and that certain types of restraints were unreasonable per se. Under these instructions, the jury had to find that the defendant's business was in interstate commerce before it considered the per se instruction.

Because I do not find error, much less prejudicial error in the instructions, I would affirm.

A true copy

ATTEST:

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Supreme Court, U.S.
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CLERK

No. 85-1067

In The
# Supreme Court of the United States
October Term, 1985

UNITED STATES OF AMERICA,
*Petitioner,*

v.

BEN M. HOGAN COMPANY, INC.,
*Respondent.*

## BRIEF FOR RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether a jury instruction, to which timely and specific objection was made, containing an erroneous, conclusive and mandatory presumption with respect to the interstate commerce element of a Sherman Act charge may constitute harmless error.

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## BRIEF FOR RESPONDENT IN OPPOSITION

## OPINION BELOW

The opinion of the Court of Appeals is reported at 769 F.2d 1293.

## JURISDICTION

The judgment of the Court of Appeals was entered on July 25, 1985. A petition for rehearing was denied on September 20, 1985. On November 14, 1985, Justice Black-

mun extended the time within which to file a petition for a writ of certiorari to and including December 19, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

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## STATEMENT

Respondent was convicted of conspiring to rig bids on three highway construction projects let by the Arkansas State Highway and Transportation Department. Respondent was convicted of one count of bid rigging in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and three counts of mail fraud, 18 U.S.C. § 1341. Respondent was fined $800,000.00 on the bid rigging count and $1,000.00 on each of the three mail fraud counts. The Court of Appeals reversed only on the bid rigging count. The Court found that an instruction mandating a conclusive presumption that bid rigging constitutes a restraint on interstate commerce, an essential element of the offense, deprived the defendant of a right so basic that it could not be deemed harmless.

Respondent specifically objected to the offensive instruction on the ground that "it would essentially relieve the government from its obligation of proving interstate commerce" and take "the interstate commerce issue away from the jury" (5 Tr. 394). The trial court immediately overruled the objection (5 Tr. 396) which was made prior to closing argument and prior to the conclusion of the instruction conference. Only after the trial court ruled it would instruct the jury that an effect on interstate commerce was conclusively presumed from bid rigging did

respondent recognize the futility of continuing to argue the interstate element of the offense. Therefore, respondent abandoned plans to proffer several modifications to the interstate commerce instructions and plans to argue this issue to the jury.

Contrary to petitioner's representation (Pet. 4), respondent did contest the government's evidence of the interstate commerce element of the Sherman Act offense. Prior to trial respondent moved to dismiss the indictment on the ground that it failed to allege the requisite effect on interstate commerce (R. 143-145). Respondent cross-examined concerning interstate commerce (e.g. 2 Tr. 152-155) and in its motion for judgment of acquittal both at the conclusion of the petitioner's case and at the conclusion of all of the evidence contested the sufficiency of the evidence on this issue (3 Tr. 164; 5 Tr. 367).

Petitioner's evidence that the alleged conspirators' activities were in or affected interstate commerce consisted of testimony that federal revenue sharing funds had been used to pay for the three highway construction projects (2 Tr. 134-140); that one of the alleged co-conspirators had purchased in the preceding year heavy equipment manufactured out of state which was used on the highway construction projects (2 Tr. 149-151; 3 Tr. 160-162); and that the three projects involved construction on highways which interconnect with other highways which are part of the interstate highway system (1 Tr. 77-78).

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## ARGUMENT

Petitioner suggests that this petition presents the same question as is presented in *Rose v. Clark*, No. 84-1974 (Pet. 9) and that this Court should hold this petition for disposition in light of a decision in *Rose v. Clark*. The question presented in *Rose v. Clark* involves a jury instruction creating a rebuttable presumption, while in this case the jury instruction contained a mandatory conclusive presumption.

The petitioner here concedes in *Rose v. Clark* that depriving a criminal defendant of a jury trial could never be harmless even if the bench trial he received was otherwise fair and reliable (Brief 11). Petitioner here also concedes in *Rose v. Clark* that *Sandstrom* error can sometimes be grave enough that it is reasonable to say that a defendant's right to have his guilt determined by the jury has been defeated (Brief 14). In *Rose v. Clark* the principal argument of the petitioner here is that the rebuttable nature of the presumption is significant in determining whether or not the presumption is the equivalent of a directed verdict on an element of the offense (Brief 15).[1]

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[1]A mandatory presumption may be either conclusive or rebuttable. Conclusive presumptions eliminate the presumed element from the trial once there is proof of the predicate facts which give rise to the presumption. A rebuttable presumption does not remove the presumed element from the trial, but rather, requires the jury to find the presumed element unless the defendant persuades the jury that such a finding is not warranted, *Francis v. Franklin*, — U.S. —, — at fn. 2, 105 S.Ct. 1965, 1971 fn.2 (1985). A rebuttable presumption shifts the burden of proof to the defendant, while an irrebuttable presumption eliminates an element from jury consideration once the predicate facts are proven, *Francis v. Franklin*, id at fn.5.

This Court's prior decisions in *Sandstrom v. Montana*, 442 U.S. 510 (1979), *Connecticut v. Johnson*, 460 U.S. 73 (1983) and *Francis v. Franklin*, 105 S. Ct. 1965 (1985) also distinguish between instructions containing a mandatory conclusive presumption and those which contain a rebuttable presumption concerning an essential element of the offense. This Court's prior plurality opinion in *Connecticut v. Johnson*, 460 U.S., and the petitioner's amicus brief in *Rose v. Clark* suggest that a mandatory conclusive presumption on an element of the offense has the effect of depriving a defendant of a jury trial. That right is so basic to a fair trial that its absence can never be treated as harmless error, *Chapman v. California*, 386 U.S. 18, 23 (1967). A mandatory conclusive presumption prevents a jury from considering an issue more effectively than a failure to instruct a jury on the requirement of proof of guilt beyond a reasonable doubt. Such failure can never be harmless error. *Jackson v. Virginia*, 443 U.S. 307, 320, fn.14 (1979).

When a trial court directs the jury to return a verdict of guilty, the resulting error is the functional equivalent of the denial of a jury trial, *Carpenters and Joiners v. United States*, 330 U.S. 395, 408-409 (1947). A mandatory conclusive presumption directs the jury to find the element of the offense to which the instruction relates and is the functional equivalent of denying defendant the right to a jury trial. In this case the trial court, over objection, instructed the jury, in essence, that bid rigging constitutes an unreasonable restraint on interstate commerce, one of the elements of the offense. That element of the offense was contested by respondent until the Court advised the parties of the instructions it would give.

By finding *Sandstrom* error in this case, the Court of Appeals necessarily concluded that it was not possible to determine with certainty that the jury had not applied the mandatory conclusive presumption as a directed verdict on the interstate commerce element of the offense. Cf. *Sandstrom v. Montana,* 442 U.S. at 514. The existence of *Sandstrom* error depends upon whether a court can find with certainty (442 U.S. 510, 526) that the jury did not apply the conclusive presumption as a directed verdict. Once a *Sandstrom* error is found, it is inconsistent for a Court to thereafter conclude beyond a reasonable doubt that a defendant was not denied his right to a trial by jury, a right so basic that its denial can never be harmless. No quantum of evidence can compensate for such an erroneous mandatory conclusive presumption.

Because jurors are usually conscientious about following instructions, it is likely that a jury will follow a mandatory conclusive presumption rather than undertake the more difficult task of evaluating evidence concerning the element of the offense the jury is instructed to conclusively presume, *Sandstrom v. Montana,* id. at 526, n. 13. It is also reasonable to expect a juror to attempt to make sense of a confusing earlier portion of an instruction by reference to a later portion of the instruction, *Francis v. Franklin,* 105 S. Ct. at fn. 7.

Once a mandatory conclusive presumption on an essential element of the offense results in a directed verdict with respect to that element, an appellate court's confidence in the integrity of the verdict is necessarily undermined because the error is likely to affect the outcome in every case in a manner not susceptible to effective review. Any such review must not only involve an appel-

late court substituting its judgment for that of the jury of which the defendant has been deprived, but must also require the appellate court to speculate about the effect of the mandatory conclusive presumption on the conduct and offense determined by the jury.

The question presented by this petition is different from the question presented in *Rose v. Clark* and very likely will not be governed by its disposition. Thus petitioner's effort here, not to obtain plenary review of the decision of the court below but to hold this case in judicial limbo while the Court considers a case involving a different question, is contrary to the basic concept governing the exercise of certiorari jurisdiction—that is, to decide important questions of federal law which have not been, but should be, settled by this Court. See Supreme Court Rule No. 17. There is a substantial probability that the disposition of *Rose v. Clark* will not decide the issue presented here, and remand of this case following such disposition would simply present the court below with the obligation to make yet another assessment of a question that has already had plenary consideration there.

Petitioner has an abundant arsenal for the pursuit of its prosecutorial powers. The device it seeks to employ here, to put other prosecutions "on hold" pending disposition of remotely related questions by this Court in proceedings to which the defendants in the other cases are not privy (but petitioner is), is fundamentally unfair and should be sanctioned by this Court sparingly, if at all.

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## CONCLUSION

The petition for a writ of certiorari should be denied. Alternatively, the Court should grant the petition and give plenary consideration to the question presented.

Respectfully submitted,

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